

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation,
GEORGE L. BAKER, Mayor Thereof, and A. L.
BARBUR, JOHN M. MANN, C. A. BIGELOW
and S. C. PIER, Commissioners, and GEORGE
R. FUNK, Auditor Thereof, Also SCHOOL DIS-
TRICT No. 1, MULTNOMAH COUNTY, ORE-
GON, Including the CITY OF PORTLAND, a Body
Politic and Corporate, W. L. WOODWARD,
GEORGE P. EISMAN, FRANK L. SHULL,
W. J. H. CLARK, J. E. MARTIN, GEORGE B.
THOMAS and F. C. PICKERING, Directors of
said SCHOOL DISTRICT No. 1, and OREGON
REAL ESTATE COMPANY, a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Oregon.

FILED
JAN 17 1923
F. D. MONCKTON,
CLERK.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

ISHAM N. SMITH, 418 Mohawk Building, Portland, Oregon, for the Appellant.

FRANK S. GRANT and H. M. TOMLINSON, City Hall, Portland, Oregon, for the Appellees
City of Portland, George L. Baker, Mayor thereof, A. L. Barbour, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, and George R. Funk, Auditor of said City of Portland.

STANLEY MYERS and SAMUEL H. PIERCE, County Court, Portland, Oregon, for the Appellees
School District No. 1, Multnomah County, Oregon, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas, and F. C. Pickering, Directors of said School District No. 1.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed Citation on Appeal on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney of the Oregon Real State Co., personally at Portland, in

said District, on the 13th day of Decebmer, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By A. Davidson,

Deputy. [1*]

In the District Court of the United States for the
District of Oregon.

Case No. E—8617.

J. B. C. LOCKWOOD,

Plaintiff and Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation, GEORGE L. BAKER, Mayor Thereof, A. L. BARBUR, Commissioner, JOHN M. MANN, Commissioner, C. A. BIGELOW, Commissioner, S. C. PIER, Commissioner, of said City of Portland, GEORGE R. FUNK, Auditor of said City of Portland; also SCHOOL DISTRICT No. 1, Multnomah County, Oregon, Including the City of Portland, a Body Politic and Corporate, W. L. WOODWARD, GEORGE P. EISMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS, and F. C. PICKERING, Directors of said School District No. 1, also OREGON REAL ESTATE COMPANY, a Corporation,

Defendants and Appellees.

*Page-number appearing at foot of page of original certified Transcript of Record.

Citation on Appeal.

The President of the United States, to the City of Portland a Municipal Corporation, George L. Baker, Mayor Thereof, A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor of said City of Portland, and Frank S. Grant and H. M. Tomlinson, Attorneys Therefor, and also to School District No. 1 Multnomah County, Oregon, Including the City of Portland, a Body Politic and Corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, Directors of said School District No. 1, and to Messrs. Stanley Myers and Samuel H. Pierce, Attorneys Therefor, and to Oregon Real Estate Company a Corporation :

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of [2] Oregon, wherein J. B. C. Lockwood, plaintiff, is appellant, and The City of Portland, a municipal corporation, George L. Baker, Mayor thereof, and A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor thereof, also School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic

and corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, directors of said School District No. 1, and Oregon Real Estate Company, a corporation, are appellees, to show cause, if any there be, why said decree in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable CHARLES E. WOLVERTON, Judge of the District Court of the United States for the District of Oregon, this 12th day of December, 1922, and of the Independence of the United States the one hundred forty-sixth, at Portland, Oregon.

CHAS. E. WOLVERTON,
Judge.

Service of the above and foregoing citation on appeal acknowledged and a copy thereof received this — day of December, 1922.

_____,
Attorneys for Defendant City of Portland and Its
Commissioners and Auditor.

_____,
Attorneys for Defendant School District No. 1
Multnomah County, Oregon, and Its Directors.
OREGON REAL ESTATE COMPANY,

By _____. [3]

Service admitted. Portland, Ore., Dec. 12, 1922.

SAM'L H. PIERCE,
Of Attorneys for School Dist. No. 1 and Its Attor-
neys.

H. M. TOMLINSON,
Of Attys. for City of Portland, Its Commrs. and
Auditor.

[Endorsed]: No. E—8617. 25—208. In the Dis-
trict Court of the United States for the District of
Oregon. J. B. C. Lockwood, Plaintiff and Appel-
lant, vs. The City of Portland et al., Defendants
and Appellees. Citation on Appeal. U. S. District
Court, District of Oregon. Filed Dec. 15, 1922.
G. H. Marsh, Clerk. [4]

In the District Court of the United States for the
District of Oregon.

July Term, 1922.

BE IT REMEMBERED, That on the 23d day
of September, 1922, there was duly filed in the
District Court of the United States for the District
of Oregon, a bill of complaint, in words and figures
as follows, to wit: [5]

In the District Court of the United States for the
District of Oregon.

J. B. C. LOCKWOOD,

Plaintiff,

vs.

THE CITY OF PORTLAND, a Municipal Cor-
poration, GEORGE L. BAKER, Mayor

Thereof, A. L. BARBUR, Commissioner, JOHN M. MANN, Commissioner, C. A. BIGELOW, Commissioner, S. C. PIER, Commissioner, of said City of Portland, GEORGE R. FUNK, Auditor of said City of Portland; also SCHOOL DISTRICT No. 1, Multnomah County, Oregon, Including the City of Portland, a Body Politic and *Corporation*, W. L. WOODWARD, GEORGE P. EISMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS, and F. C. PICKERING, Directors of said School District No. 1, also OREGON REAL ESTATE COMPANY, a Corporation,

Defendants.

Bill of Complaint.

Plaintiff alleges that—

I.

Plaintiff J. B. C. Lockwood is a citizen of the United States and a *bona fide* resident, citizen and inhabitant of the State of Washington.

The amount involved in this controversy exceeds three thousand dollars, exclusive of interest and costs.

The controversy herein involves individual and property rights guaranteed and protected by the Constitution of the United States, to wit, by Article XIV, Section 1, thereof, amendatory of the Constitution of the United States, which provides *inter alia*:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

The controversy herein also involves individual and property rights guaranteed and protected by the Constitution of the State [6] of Oregon, to wit, Article I, Section 18, thereof, which provides:

“Private property shall not be taken for public use nor the particular services of any man be demanded without just compensation; nor, except in case of the state, without such compensation first assessed and tendered.”

The controversy herein is wholly between citizens, residents and inhabitants of one state, to wit, this plaintiff who is a citizen, resident and inhabitant of the State of Washington, on the one part, as plaintiff, and all the defendants hereinafter named who are now and at the time of the commission of the grievances herein complained of were then *bona fide* citizens, residents and inhabitants of the State of Oregon.

II.

At and during all the periods of time named herein the defendant The City of Portland, Oregon, was then and now is a municipal corporation organized, created and existing under and by virtue of the laws of the State of Oregon.

The individual rights and property rights affected

by this case arise out of, relate to, are connected with, and depend upon, real property and easements therein situated within the said City of Portland, Oregon.

At the time of the commission of the grievances herein complained of defendant George L. Baker was then and now is Mayor of the defendant City of Portland, Oregon, and the defendants A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier were then and now are commissioners of said defendant City of Portland, and together with said Mayor constitute and are the council of said City of Portland, and when acting as such council are invested with the power and authority given by the laws and the charter of the City of Portland, and on behalf of said City the said City Council is authorized to and does exercise power, dominion and control over the various public properties as specified in and conferred by the charter of said City and ordinances passed by virtue thereof; [7]

That at the time of the commission of the wrongs herein complained of defendant, George R. Funk was then and now is auditor of the City of Portland, and as such is charged among other things with the duties as follows:

“An ordinance when passed by the council shall be signed by the mayor, or in his absence by the president of the council, and attested by the auditor, and shall be carefully filed and preserved and a record thereof made in a book kept for that purpose marked ‘ordinance record.’ ”

III.

At and during the periods of time named herein and especially at the time of the grievances herein complained of, the defendant School District No. 1, Multnomah County, Oregon, including the City of Portland, was then and now is a body politic and corporate, organized, created and existing under and by virtue of the laws of the State of Oregon with its principal place of business at Portland, Multnomah County, Oregon, and the defendants, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, are now and were at the time of the commission of the grievances named herein the duly elected, qualified and acting board of directors of said School District.

IV.

During all the periods of time named herein, and since April 30, 1872, the defendant The Oregon Real Estate Company was then and now is a corporation duly organized, created and existing under and by virtue of the laws of the State of Oregon, with its principal place of business at Portland, Multnomah County, Oregon.

That said defendant was and is by its charter authorized to engage in, and was then and now is engaged in the enterprise business and pursuit and occupation described in its articles of incorporation, to wit: [8]

“The enterprise, business, pursuit and occupation in which this corporation proposes to engage, and in which it shall engage, is to pur-

chase, receive, take, hold, possess, improve, sell, convey, lease, mortgage, and in any other way or manner use and dispose of real estate of any and all kinds lying, or being any place within the limits of the State of Oregon; and also to improve any of such lands by fencing, clearing, grubbing, filling or otherwise, and by laying off by surveys or otherwise any or all parts or portions of such lands into lots and blocks, streets, alleys or public parks or squares, and by the erection of warehouses, mills, factories, machine shops, elevators, docks, wharves or other improvements, and generally to deal in real estate and do a real estate business in said State of Oregon, and all things necessary and convenient to be done in and about such business to carry on the same."

V.

The present limits and boundaries of said City of Portland embrace and include several municipalities which prior to their consolidation with the City of Portland about the year 1891 were then independent and separately organized municipalities, among which was one municipality known as and called the city of East Portland, Oregon, which from the date of its incorporation down to the consolidation of the City of Portland about 1891 was then a municipal corporation organized, created and existing under and by virtue of the laws of the State of Oregon.

Said City of East Portland embraced numerous lots and blocks separated and segregated by streets

and highways, and also embraced certain additions to said city, among which was Holladay Addition to East Portland which was dedicated as Holladay's Addition to East Portland by George W. Weidler by dedication deed and plat dated December 17, 1870, acknowledged December 17, 1870, and recorded December 17, 1870, in Book M of Deeds at page 302 and Book 1 of Plats at page 72 of the records of Multnomah Coutny, Oregon; and the blocks, the streets and alleys embraced within said plat were rededicated by a deed and plat of dedication executed by Samuel M. Smith, J. H. Mitchell and George W. Weidler dated February 1, 1871, acknowledged February 1, 1871, and recorded February 1, 1871, in Book M of deeds at page 634 and book 1 of Plats at page 73 of the records of Multnomah County, [9] Oregon.

That said deeds and plats of dedication have never been revoked or set aside; that the streets and public thoroughfares and the lots and blocks specified therein are still matters of record and still exist.

That since the consolidation of the City of East Portland with the City of Portland about 1891, said Holladay's Addition to East Portland has been and is commonly known as Holladay's Addition to Portland, Oregon, and is referred to as such in this complaint.

That by said original plat the streets running east and west in said addition are sixty feet wide except Holladay Avenue which is eighty feet wide, and "Pacific," "Oregon," "Willamette," and "Salem"

Streets are prolongations of the streets in Wheeler's Addition to East Portland and are fifty feet wide; the streets running north and south in said Holladay's Addition to East Portland are prolongations of the streets in East Portland and Wheeler's Addition to East Portland and are sixty feet wide.

By the amended deed and plat of dedication the streets running east and west in said addition are sixty feet wide, except Holladay Avenue which is eighty feet wide, "Pacific," "Oregon," "Multnomah" and "Salem" Streets are the prolongations of the streets in Wheeler's Addition to East Portland and are fifty feet wide; the streets running north and south are prolongations of the streets in East Portland and Wheeler's Addition to East Portland and are sixty feet wide.

That said streets designated on said plat and deed of dedication are still in existence under the original or under changed names thereof.

That plaintiff attaches to this complaint as Exhibit "A" a blue-print copy of said Holladay's Addition to East Portland, Oregon, and refers to said plat and incorporates the same herein as showing the location, direction, width and existence of the [10] various streets, public highways and blocks therein.

That the portions of the streets involved in this controversy are portions of Clackamas Street and East 8th Street hereafter designated which said streets are shown upon said plat Exhibit "A."

VI.

After making and recording of both said plats

and deeds of dedication, and by deed dated June 19, 1872, acknowledged June 19, 1872, recorded July 1, 1872, in Book S of deeds at page 327 of the records of Multnomah County, Oregon, George W. Weidler, former owner of the original Holladay's Addition to East Portland conveyed to the defendant, The Oregon Real Estate Company, the following described lands in said addition, with other lands, to wit: The following described parcel of real estate as shown upon the recorded map of Holladay's Addition to East Portland, County of Multnomah and State of Oregon, viz: Full Blocks 25, 55, 56, 59, 62, 66, 67, 68, 70, 71, 73, 74, 75, 77, 81, 82, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 134, 135, 137, 138, 139, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, and such fractional parts of Blocks 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, and 213 as lies south of the claim line between William Irving and Jacob Wheeler's Donation Land Claim in section 35, Township 1 north range 1 east of Willamette Meridian.

Also lots 5 and 6 in Block 26, Lots 4, 5 and 6 in Block 43, Lots 1, 2, 7 and 8 in Block 47, Lots 1, 2, 7 and 8 in Block 49, Lots 1, 2, 7 and 8 in Block 50, Lots 7 and 8 in Block 51, Lots 5 and 6 and fractional Lots 3, 4, and 7 in Block 54, Lots 1, 2, 5, 6, 7 and 8 in Block 63, Lots 1, 2, 5, 6, 7 and 8 in Block 69, Lots 1, 2, 5, 6, 7 [11] and 8 in Block 78, Lots 1, 4, 5, 6, 7 and 8 in Block 79, Lots 1, 2, 3, 4, 7 and 8 in Block 80, Lots 5, 6, 7 and 8 in Block 90, Lots 1, 2, 5, 6, 7 and 8 in Block 99, Lots 3, 4, 5, 6, 7 and 8 in Block 136.

And whereas certain lots and blocks have been sold prior to this conveyance for which no deeds have been given but instead an agreement for the making of deeds when full payments have been received the same are hereby conveyed to the Oregon Real Estate Company as aforesaid on the condition only that when full payments are made and the said Oregon Real Estate Company shall be called upon for deeds thereof, they, the said Oregon Real Estate Company shall make good and sufficient warranty deeds to the following described parcels of real estate in lieu of the said agreements, viz: Full blocks 58 and 119.

Also fractional Blocks 53 and Lots 4 in Block 26, Lots 3 and 4 in Block 47, Lots 3, 4, 5 and 6 in Block 49, Lots 3, 4, 5, 6 in Block 50, Lots 3 and 4 in Block 69, Lots 3 and 4 in Block 78, Lots 3 and 4 in Block 99, all situate in and shown upon the recorded maps of Holladay's Addition as aforesaid.

VII.

Defendant School District No. 1, Multnomah

County, Oregon, owns Block 77 Holladay's Addition, bounded by East 6th and East 7th Streets, and by Clackamas and Halsey Streets in said Holladay Addition; it also owns Block 96 Holladay's Addition bounded by East 7th and East 8th Streets, and by Clackamas and Halsey Streets therein.

The defendant the Oregon Real Estate Company owns Blocks 95, 97 and 98 of Holladay's Addition and has entered a contract to sell said blocks to the defendant School District No. 1 of Multnomah County, upon the condition precedent that those portions of Clackamas Street lying between the East line of East Seventh Street north and the West line of East Ninth Street North, as shown on said Exhibit "A," and also that portion of East Eighth Street North lying between the South line of Halsey Street and the North line of Wasco Street, shown [12] on said Exhibit "A," shall first be vacated so that the said Oregon Real Estate Company may transfer such portions of said streets to the said defendant School District, in conjunction with said Blocks 95, 97 and 98 as School site and playground for the school children who may attend at Holladay School and that said School District contemplates the erection of a new school building upon certain portion of said entire premises and the devotion of the entire of said premises now owned by it as well as those blocks and portions of said streets to be so acquired by it, for such school purposes and for school playgrounds as aforesaid.

VIII.

The defendants, The Oregon Real Estate Company and the School District aforesaid, are attempting to carry out a plan for the sale to the School District of the lands and the portions of streets above designated, and in so doing said defendants acting together have sought and are seeking to induce the defendant the City of Portland, acting through its Mayor and Commissioners aforesaid, to enact ordinances providing for the vacation of those portions of East 8th Street and Clackamas Street heretofore designated.

The defendants, the School District and its Directors aforesaid, acting in conjunction with the defendant, The Oregon Real Estate Company, have presented to the defendant the City of Portland, and to its council consisting of its Mayor and Commissioners as aforesaid, and filed with its auditor George R. Funk aforesaid, petitions for the vacation of those portions of said streets above designated, a copy of which said petitions is attached hereto marked Exhibits "C" and "D," and have also presented to said City of Portland and to its council and mayor, defendants above named, a second petition signed by numerous persons who do not own property fronting on or abutting upon or within the designated area required for signers of petitions for the vacation of streets, a copy of which last named [13] petition is attached hereto and marked Exhibit "B," and all of said Exhibits "B," "C" and "D" referred to in this paragraph are prayed to be read as part hereof.

IX.

Said petitions respectively were filed with and are now on file with the defendant Funk as auditor of said city, and after the filing of said petitions and each thereof, and actuated thereby and acting thereon, the defendants the City of Portland and its Mayor and Commissioners above named gave notice of the time and place for hearing objections and protests against the vacation of said streets, to wit, September 15, 1922, at the council chamber in the City Hall of said City of Portland.

At the designated time and place remonstrances and objections were filed against the proposed vacation of the portions of said streets. Said City council heard said petitions and remonstrances and objections and overruled the same and accepted and received and filed the reports of certain of its officers to whom had been referred the matter of said petitions, and thereupon and on the 15th day of September, 1922, there was introduced before the council of the City of Portland, consisting of said defendant Mayor and Commissioners aforesaid, certain ordinances, copies of which are attached hereto marked respectively Exhibits "E" and "F," which in effect provide for the vacation of those portions of East 8th Street and East Clackamas Street so sought to be vacated as aforesaid, and for the surrender and cancellation of those portions of said streets and the cessation and abandonment of the use thereof, as streets;

That the objects and purposes of the vacation of those portions of said streets above designated are

(a) the abandonment and the vacation of said streets for street purposes;

(b) The tearing up and destruction of such portion of said streets;

(c) the transfer of those portions of said streets to private residential and school uses as specified in said petitions for vacation [14] thereof;

(d) the cancellation and surrender of all public rights and the destruction of the rights of all the citizens who have bought land in Holladay's Addition under said plats and deeds of dedication, to have, hold, exercise or enjoy any easements or rights of passage over and across said portions of said streets so sought to be vacated;

(e) And to deprive the public generally of the use of said streets for highway, thoroughfare or street purposes.

X.

At said meeting of said City Council on September 15, 1922, each and both of said ordinances so introduced was read the first and second time, and was passed to a third reading, and the third reading was by reference of the council specified for September 27, 1922, but said council of the City of Portland aforesaid claims the right to read said proposed ordinances and both of them a third time on any day after the 22d of September, 1922, to wit, on Saturday, September 23, 1922, and any day thereafter and said City Council claims to have the right to complete the enactment of said ordinances and to put them into immediate force and

effect by declaring the existence of an emergency therefor.

XI.

That no emergency in fact exists for the passage of said ordinances or either of them under the emergency power of the City council; that the portions of said streets sought to be vacated are not now nor were they ever, a menace to the public health, the public welfare or the public safety; neither that portion of said East 8th Street nor the portion of said Clackamas Street so sought to be vacated is dangerous to travel or unfit for travel, or has been abandoned by the public; that the City of Portland has means with which to keep up said portions of said streets and each thereof: That no public interest requires the vacation of either portion of either of said streets. [15] That those portions of East 8th Street and Clackamas Street so sought to be vacated are hard surfaced, are in first-class condition of repair, are safe for travel, are needed for travel, are used by the public generally as a means of ingress and egress and of transportation and as thoroughfares for passage from various parts of the City of Portland to other parts thereof, and that said portions of each of said streets are not inherently dangerous but are safe and are much used by the inhabitants of Portland generally and more especially by the residents of the City of Portland who have built homes within and who reside within the limits of Holladay Addition as aforesaid. .

XII.

That after the acquisition of the properties as shown in the deed from George W. Weidler to the defendant, The Oregon Real Estate Company, as above alleged, said defendant, The Oregon Real Estate Company, from the date of the acquisition of said properties thence hitherto, has been engaged in the business of selling and has sold numerous, divers and sundry lots, parcels of land and blocks theretofore owned by it in Holladay's Addition to various citizens, residents and inhabitants of Portland, Oregon, and to others including this plaintiff, and has based its sale, among other things, upon the representation of the existence of the streets, thoroughfares, public ways, parks and blocks as shown in the plat marked Exhibit "A" attached hereto; and said Oregon Real Estate Company has received large sums of money from its sales of said real estate and in every sale of real estate by said company it has represented to the purchasers, and now represents, that the streets, thoroughfares and public ways shown on the plat of Holladay's Addition attached hereto as Exhibit "A," will be forever open to immediate purchasers and to any subsequent purchasers and to the public generally for use as a means of ingress and egress and of transportation to and from [16] and throughout Holladay Addition, and to various parts of the City of Portland connecting therewith.

That all the streets shown upon said Exhibit "A" attached hereto are a part of the general system of streets, thoroughfares and public ways existing in

Portland, Oregon, and each of said streets connects with or intersects or opens a way of ingress and egress to and from other streets and thoroughfares of the City of Portland, Oregon.

That as an inducement to purchasers and as part of the consideration to purchasers from The Oregon Real Estate Company of the lands embraced within Holladay's Addition aforesaid, said defendant company has represented that the streets shown on said plat marked Exhibit "A" were in existence, were public streets, dedicated for public purposes, and would be maintained and were maintained as streets, thoroughfares and public highways and as a means of ingress and egress to and from and throughout Holladay Addition and the connecting thoroughfares of the City of Portland as above outlined.

XIII.

This plaintiff, J. B. C. Lockwood, purchased from the defendant The Oregon Real Estate Company by warranty deed dated April 6, 1908, recorded April 6, 1908, lots 1, 2, 7 and 8, of Block 99, of Holladay's Addition aforesaid, as per said plat, at the designated price of \$9,000, and as part of the consideration of said purchase The Oregon Real Estate Company, defendant herein, represented to this plaintiff that the streets shown on said plat marked Exhibit "A" were in existence and would be in existence, and were public streets and thoroughfares and highways and furnished a means of ingress and egress to and from his said property, and as a means of transportation from other portions of said Holladay Addition and as connecting

streets and thoroughfares of the general system of streets and highways of the city of Portland, Oregon, as heretofore alleged. [17]

XIV.

That the property so purchased by this plaintiff from the defendant The Oregon Real Estate Company, as above alleged, fronts on the south side of Wasco Street and corners upon the street intersection of Wasco Street and East 8th Street North, and is immediately adjacent to Wasco Street and in immediate proximity, to wit, within from 60 to 160 feet of the south termini of that part of East 8th Street so sought to be vacated, and is within 260 feet of certain portions of that part of Clackamas Street sought to be vacated as aforesaid.

This plaintiff objects to and protests against the vacation of those portions of East 8th Street North and of Clackamas Street affected by the proceedings hereinbefore described.

XV.

The defendant the City of Portland exercises its governmental functions including the power to vacate streets in virtue of a certain charter in effect July 1, 1913, as revised by the Council August 19, 1914, entitled

“AN ACT

To amend an Act of the Legislative Assembly of the State of Oregon entitled, ‘An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,’ filed in the office

of the Secretary of State, January 23, 1903, amended by the Legislative Assembly of the State of Oregon in 1905 and subsequently amended by the people of the City of Portland, providing for a commission form of government.

BE IT ENACTED BY THE PEOPLE OF THE CITY OF PORTLAND, AND THE CITY OF PORTLAND DOES ORDAIN AS FOLLOWS:

That an Act of the Legislative Assembly of the State of Oregon entitled, 'An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State January 23, 1903, and subsequently amended, by the legislative assembly of the State of Oregon in 1905 and subsequently amended by the people of the City of Portland, be and the same is hereby amended as hereinafter set forth, providing for a commission form of government,"

of which this plaintiff makes profert and craves oyer at the hearing [18] of this cause and tenders copy thereof for use throughout this case.

The provisions of said charter concerning the vacation of streets are as follows, to wit:

Section 3: "The City of Portland shall be invested within its limits with authority to perform all public and private services, including those of an educational or recreative character

as well as others, and with all governmental powers except such as are expressly conferred by law upon other public corporations within such limits and subject to the limitations prescribed by the constitution and laws of the State, and to acquire by purchase or otherwise property without its limits."

Section 7: "The title, rights and interest of the City of Portland in and to all water front, wharf property, land under water and made land built upon same, or any lands on the water side of the high water or meander lines of navigable waters as established by the original U. S. surveys and conformed to by the original plats of the City of Portland, and all landings, wharves, docks, highways, bridges, avenues, streets, alleys, lanes, parks and all other public places, and like property that it may now own or hereafter may acquire are hereby declared to be inalienable. The rights of the City therein shall not be divested or vacated for a distance of two thousand feet from any meander line of any navigable water, or one thousand feet from any railroad depot or terminal yard; *provided, that at a greater distance than specified above from any such meander lines and railroad terminal streets may be vacated on proceedings prescribed elsewhere in this Chapter, except that the ordinance of vacation shall require for its passage a vote of at least four fifths of all the members of the Council and the approval of the Mayor. But whenever the City shall own*

all the property abutting upon both sides of any part of a street, and such part of the street shall be necessary for the use of such property of the city for a public purpose the street may be vacated in the manner elsewhere provided in the Charter or the laws of the State of Oregon in force at the time for the vacation of streets; provided, however, that the right herein granted shall only be exercised when such vacation shall not interfere with any improvement proposed by the Dock Commission or with access to the water front or any transportation terminal. But replatting of streets in such manner that new ground is dedicated or required without additional cost to the City of equal area with that vacated, and affording equal way and access to the same terminus, shall not be deemed within the prohibition of this act."

Section 8 (*inter alia*): "A street shall be held to fulfill its function as a street by being used in any way for the purpose of travel, transportation or distribution by or for the public."

Section 48: "Ordinances (a) making appropriations and the annual [19] tax levy, (b) relative to local improvements and assessments therefor, and (c) emergency ordinances, shall take effect immediately upon their passage. All other ordinances enacted by the Council shall take effect thirty days after their passage, unless a later date is fixed therein, in which event they shall take effect at such later date,

subject to the referendum and subject to the provisions of Section 52 of this Charter.”

Among the powers continued in force from the charter of 1903, under the existing charter of the City of Portland are the following:

“The Council has power and authority, subject to the provisions, limitations and restrictions in this charter contained:

(12) To provide for the opening, laying out, establishing, altering, extending, vacating and closing or for establishing and changing the grades of streets, squares, parks, public places, and to provide for the improving and repairing of streets, squares, parks and public places or of any land over which any right of way has been obtained, or granted for any purpose of public travel by means of any kind of work, improvement or repair mentioned in this Charter, subject to the provisions and limitations contained in this Charter, and in the Constitution of the State of Oregon.”

Section 77: “As Clerk of the Council, the Auditor shall keep a correct journal of its proceedings, and shall file and keep all books, papers and maps connected with the business of the Council.”

This plaintiff is informed and believes, and so alleges, and states the truth to be, that said charter of the City of Portland does not at any place prescribe the proceedings to be followed in the vacation of any street.

Section 284 of said charter provides:

“That so much of Sections 346 and 347, 348, 349 and 350 as heretofore amended, and of Sections 362 to 421, both inclusive, of the Charter of 1903, as is not inconsistent with the provisions of this Charter shall remain in full force and effect as ordinances only subject to repeal and amendment and to the enactment of new legislation by the Council in the manner and subject to the restrictions in this Section provided upon the subject of improvements of whatever nature to be paid for by local assessment. Such Sections shall be known as the Local Improvement Code. No repeal of any portion thereof, amendment thereto nor new legislation upon the subject shall be made by the Council except by ordinance which shall be published in full and in its final form in the City Official Newspaper at least thirty days before its final passage. Notice [20] shall be given in the City Official Newspaper and by publishing conspicuous advertisements in one or more daily papers published in the City of Portland having a circulation of not less than 1500 not less than five times, the last of such notices to be published not less than ten days before the final adoption of any such amendment, repeal or new legislation. Upon the adoption of any amendment to or the repeal of any part of such Local Improvement Code or the adoption of any new legislation upon the subject, the whole Local Improvement Code

shall be printed in pamphlet form and the Auditor shall be furnished with a sufficient number of copies thereof for distribution to all persons inquiring for the same. The Council, in the exercise of its general legislative powers, may provide in its discretion for the performance of any public work by or on behalf of the City and for the method of payment thereof, but said Local Improvement Code must provide for the giving of not less than ten days' notice by publication, or by mailing to persons interested, (a) of any intention to make any improvement, and (b) of any proposed assessment against property owners for the same, and the right shall be preserved to the owners of sixty per centum in extent of the property affected by any assessment for a local improvement except for street opening or sewers to defeat the same by remonstrance."

Plaintiff further alleges that no new legislation or no new codification has ever been made, or enacted by the City of Portland, upon said subject, or any appeal of the Local Improvement Code ever been attempted.

Plaintiff further alleges that said section 362, 363, and 364 of the Charter of 1903 referred to above, which are continued in full force and effect as an ordinance only, and not as a part of the Charter, read as follows:

"Section 362. Whenever any person or corporation interested therein shall desire the vacation of any street, or part thereof, within the

City of Portland, the person or corporation so desiring said vacation shall give notice, by advertising thereof, for four consecutive weeks, in the City Official Newspaper that at a regular meeting of the Council of the said City, to be had at the time stated in such notice of publication, a petition will be presented to the Council praying for the vacation of such street, or portion thereof, particularly describing the same. The petition, so to be presented to the Council shall set forth a description of the part of the street proposed or sought to be vacated, and the purpose for which the ground is proposed to be used, *and the reason for such vacation*, and there shall be appended to such petition, as a part thereof, and as the basis for such vacation, and as a *basis for the granting of the prayer of such petition*, the consent of the owners *in fee simple*, of at least two-thirds of the real estate *fronting on both sides of said street* which or part of which is proposed to be vacated, estimated upon the frontage of the street, such frontage to commence at a line [21] drawn equidistant from the termini of the street, or portion thereof, proposed to be vacated, and extending along such proposed vacation the entire length thereof and two hundred feet in each direction from the termini thereof, unless such street shall not be continuous in either direction, in which case the consent of the owners above provided for shall only be required for the distance that it is continuous;

provided, that in the vacation of a plat it shall require the consent of the owners of two-thirds of all the real estate fronting on the streets designated on such plat. The consent of the owners of the requisite number of front feet hereinbefore required to be attached to the petition for the vacation of a street shall be given in writing and duly acknowledged before an officer authorized to take acknowledgments, and such consent shall be attached to the petition for such vacation, and such petition and consent shall be filed with the Auditor. The Council shall, upon the presentation of such petition, and the filing of the proof of the due publication of the notice herein prescribed with the Auditor, fix a time for hearing said petition and objection thereto, if any be filed. At the time fixed by the Council for hearing said petition, and the objections filed thereto, if any, the Council shall ascertain and determine whether the consent of the owners of the requisite number of front feet has been obtained as aforesaid, and such finding shall be made a matter of record, and shall be conclusive of the facts as found in all collateral proceedings, and shall be *prima facie* evidence of the facts in all direct proceedings. If upon such hearing the council shall find that the public interest would not be prejudiced by the vacation of such street, or part thereof, applied for, and that the consent of the owners of the requisite number of front feet has been obtained,

as hereinbefore provided, the Council may grant the prayer of the petitioner in whole or in part, and may vacate the street sought to be vacated by such petition, and cause such vacation to be made a matter of record.

“Second 363. If upon the hearing of the petition for the vacation of such street, or part thereof, as in the preceding section provided for, the Council shall determine that such street should be vacated, and shall by ordinance vacate the same, and such street shall be attached to the lots or ground bordering on such street, and all right and title thereto shall vest in the owners of the property on each side thereof in equal proportions. In every case where a street shall have been originally dedicated wholly by the owner or owners of the property abutting upon one side only of such street, then in the event of the vacation of such street all right and title thereto shall vest in the then owner or owners of the property abutting upon the side of the said street last aforesaid.

“Section 364. The vacation of any street by the Council shall only be made by ordinance, and a certified copy of such ordinance shall be filed for record, and duly recorded, in the office of the County Clerk of Multnomah County, and said County Clerk shall record the same in the records of deeds for said county and place an appropriate reference upon the margin of the original plat or plats of said street, or part

thereof vacated, to indicate the book and page where such vacation is recorded.

“No street shall be vacated upon the petition of any person or corporation whereby such petition it is proposed to replat [22] or rededicate any street or streets in lieu of the original plat or streets, unless such petition shall be accompanied by a plat showing the proposed manner of replatting of the street, alleys or highways to be dedicated in lieu of the street or streets asked to be vacated, and attached to which proposed plat or dedication there shall be the sworn affidavit of the person proposing to make such new plat or dedicate such street for highways, that such proposed plat or dedication of streets will be made immediately upon the vacation prayed for in the petition in consideration thereof.”

That unless restrained by order of this Court, said defendants, the City of Portland and its Mayor and Commissioners, members of its city council aforesaid, will place said ordinances marked E and F and attached to this complaint upon their final passage, and that said Mayor of said City of Portland on September 15, 1922, announced in the presence of said councilmen and in open council, and after said ordinances had been read the first and second times, that said ordinances could not come up for final passage until the eighth day thereafter, and that the members of said council, meaning the Commissioners and the Mayor of the City of Portland as aforesaid, were not likely to change their

minds on said subject, and gave assurance of the final passage of both said ordinances.

That said Mayor and Commissioners, constituting the council of the City of Portland, threaten to, and unless restrained by this court will, finally pass said ordinances attached hereto as Exhibits "E" and "F," and will file the same with the defendant Funk as auditor aforesaid, and will vacate and cease to use said portions of East 8th Street and East Clackamas Street heretofore described, and will permit the defendants, the School District aforesaid and the directors thereof, and the defendant the Oregon Real Estate Company, to tear up and destroy such portions of said streets and to render such portions of said streets unfit for public use or travel, and will prevent the public generally and more particularly this plaintiff from using said portions of said streets for street or highway or [23] thoroughfare purposes, and will deny to this plaintiff his rights of easement therein and thereto and his rights of passage, and ways of ingress and egress thereover, and thereby will deprive plaintiff and his property of his free rights of ingress and egress to and from and over the various portions of said streets connecting with the streets of the City of Portland, although vacation of said portion of said streets does not completely deprive this plaintiff of all his ways of ingress and egress to his property.

XVI.

That the proposed dedication of said streets as contemplated and the actual vacation thereof, if

made, is void, and is an infringement upon and an invasion of the property and property rights of this plaintiff, and will result in depriving this plaintiff of his property and property rights without due or any process of law, in this

(1) That by each of said petitions for the dedication of said streets the purposes of said petition are stated therein and shown as a purpose to acquire said street property for private purposes.

(2) That each of said petitions shows the respective part of each street so sought to be vacated to be a public street, and neither of said petitions shows any public or other necessity for the vacation of any part of either of said streets.

(3) That neither petition shows that the vacation of either part of either of said streets is necessary to protect the public health, the public safety, the public peace or the public welfare.

(4) That neither of said petitions shows that the vacation of either portion of either street is due to the inability of the City of Portland to maintain either portion of either of said streets.

(5) That neither petition for the vacation of either part of either of said streets shows that the portions of said streets sought to be vacated has been abandoned or has fallen into disuse or is not necessary or convenient as a means of ingress and egress [24] to other portions of the streets and highways of Portland, Oregon; or that either part of either street affected by the proceedings complained of, has ceased to fulfill its functions, as de-

fined in Section 8 of the charter of the City of Portland aforesaid.

(6) That neither of said petitions shows any emergency or any public necessity or any public right affected by the existence of such portion of said streets or requiring the vacation thereof.

(7) That the petition for the vacation of each respective part of each street is signed by The Oregon Real Estate Company, defendant herein, and that said company together with School District defendant herein, signs each and both of said petitions, and that said The Oregon Real Estate Company by reason of the matters herein set forth, and of its deed to this plaintiff, and of its sale of its property in Holladay's Addition, based upon the plat marked Exhibit "A" herewith, and upon the representations of the streets, thoroughfares, parks and blocks as per said plat, became, is and ought to be, estopped from petitioning for the vacation of any of said streets shown on said plat; and that the signing of said petition by said defendant The Oregon Real Estate Company is a fraud and a wrong upon this plaintiff's rights and upon his easements and his vested property rights acquired under his deed aforesaid, and is a breach of covenant of the warranties contained in said warranty deed which plaintiff obtained from the defendant The Oregon Real Estate Company as heretofore alleged, and that if said The Oregon Real Estate Company is prevented from signing said petition and its signature thereto held for naught then said petitions and each thereof is void as neither of said petitions will

then contain the requisite signatures for the vacation of said street as provided in the ordinance heretofore set forth.

That except and but for the signing of said petitions and each thereof by the defendant The Oregon Real Estate Company the signature to said petitions and each of them is manifestly insufficient to procure the vacation of each portion of each street involved herein, under the provisions of the ordinance heretofore quoted. [25]

(8) That said petition for the vacation of the portion of East 8th Street herein described does not contain the signature of the owners of two-thirds of the property affected by the proposed vacation, as defined in the ordinance heretofore quoted.

(9) That by this procedure an attempt is made to have the City council of Portland, Oregon, take property which is already devoted to one public use, and without reason for the cessation of such public use to convert such property to the use of the Oregon Real Estate Company—a private corporation—for sale to the defendant School District which is a different political organization from the City of Portland and so to manipulate said property that the defendant The Oregon Real Estate Company may make a private transaction predicated upon the vacation of said streets and may receive compensation from the defendant the School District, therefor.

(10) That by the proposed vacation of said streets an attempt is made to deprive this plaintiff

of his property and property rights without compensation and without condemnation and such proposed vacation of such portions of said streets is an invasion of this plaintiff's property and property rights and is a denial to him of his rights guaranteed by amendatory Article 14, Section 1 of the Constitution of the United States heretofore quoted and of Article 1, Section 18, of the Constitution of the State of Oregon heretofore set out.

(11) That the defendants and each of them are acting together and are attempting to take from this plaintiff his property and property rights without due or any process of law and are seeking through the Legislative and executive departments of the City of Portland to pass a judgment which will take from this defendant his property and property rights without compensation and without process of law, contrary to the provisions of those sections of the Constitution of the United States and of the State of Oregon heretofore quoted.

(12) That the defendants herein, and each of them, by reason [26] of all the matters herein set forth, are of right and ought to be estopped from attempting to vacate said portions of said streets herein referred to; that the defendants have deliberately and purposely undertaken to vacate those portions of said streets herein referred to, with knowledge and means of knowledge of the matters of record set out in this complaint and of plaintiff's right by virtue thereof.

(13) That defendant the City of Portland and its Mayor and Commissioners aforesaid threaten

to pass said ordinances hereinbefore referred to and to give effect thereto, and thereby the defendants and each of them are acting together and for a common purpose and threaten to and will, unless restrained by this court, deprive this plaintiff of his rights and property rights as heretofore set forth.

(14) That the said Ordinances seek to impair and if they are passed and become effective they will impair the obligation of the contract, to wit, the warranties and covenants contained in the said warranty deed from the defendant, The Oregon Real Estate Company, to this plaintiff, heretofore referred to and thereby the defendants threaten to, and by the passage and enforcing of said ordinances, they will violate a provision of the Federal Constitution, to wit, Article I, Section 10, reading

“No state shall * * * pass any law impairing the obligation of contracts.”

XVII.

That the vacation of said portion of each of said streets will cause plaintiff immediate and irreparable loss, before this matter can be heard on notice, and that if the vacation of such streets is accomplished by the passage and enactment of such ordinance and becomes effective, that this plaintiff will lose and be deprived of his easements in and to said portions of said streets, and thereby will be deprived of part of the consideration for his said deed as heretofore alleged, and that [27] plaintiff has no other plain, speedy or adequate remedy at law or otherwise to protect his rights save by an

injunction issued out of this court directed to the defendants and each of them, and to their and each of their servants, assistants, agents, attorneys, deputies and employees, and to all persons acting in aid of them or either of them, restraining and preventing them and each of them from passing said ordinances, or if said ordinances are passed before the issuance of this injunction herein, from giving effect thereto.

XVIII.

That plaintiff institutes this suit on his own behalf and on behalf of all other property owners in Holladay Addition similarly situated as plaintiff, and requests that such other property owners therein as may hereafter seek to join him may be permitted to do so and to litigate these matters as a class.

WHEREFORE plaintiff, J. B. C. Lockwood, prays decree as follows:

(1) That a temporary restraining order be issued upon the filing of this complaint and be directed to the defendants, to wit: The City of Portland, a municipal corporation, George L. Baker, Mayor thereof, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, George R. Funk, auditor of said City of Portland; also School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic and corporate; W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, directors of said School District No. 1, also

Oregon Real Estate Company, a corporation, and to each of them, and to their and each of their deputies, attorneys, agents, assistants and employees, and to all persons acting in aid of them, or either of them, commanding them and each of them to desist and refrain from attempting to pass said ordinances referred to herein, or either of them, and from attempting to vacate or from vacating those portions of East 8th Street and of Clackamas Street hereinbefore [28] referred to until the further order of this court.

(2) That a time and place be set for hearing of said temporary restraining order, and that upon hearing thereof said temporary restraining order be continued in force during the pendency of this cause.

(3) That upon the final hearing of this cause said temporary restraining order and injunction be made perpetual by the decree to be rendered herein, and that by said decree the defendants above named, and each and every of them their and each and every of their deputies, attorneys, agents, assistants and employees, and all persons acting in aid of them, or either or any of them, be absolutely and forever restrained and prohibited from in any manner attempting to vacate those portions of East 8th Street and Clackamas Street, above described, and from interfering with the property and property rights of plaintiff as herein set forth.

(4) That the proceedings to vacate said portions of said streets be declared void and of no effect.

(5) That this complaint, verified, be treated as an affidavit upon which said temporary restraining order and the injunction thereafter to be issued, if any, shall be issued in this case.

(6) That this plaintiff have such other relief in the premises as is just and equitable with costs; and plaintiff will ever pray.

(Duly verified by counsel.)

ISHAM N. SMITH,
418 Mohawk Building,
Portland, Oregon. [29]

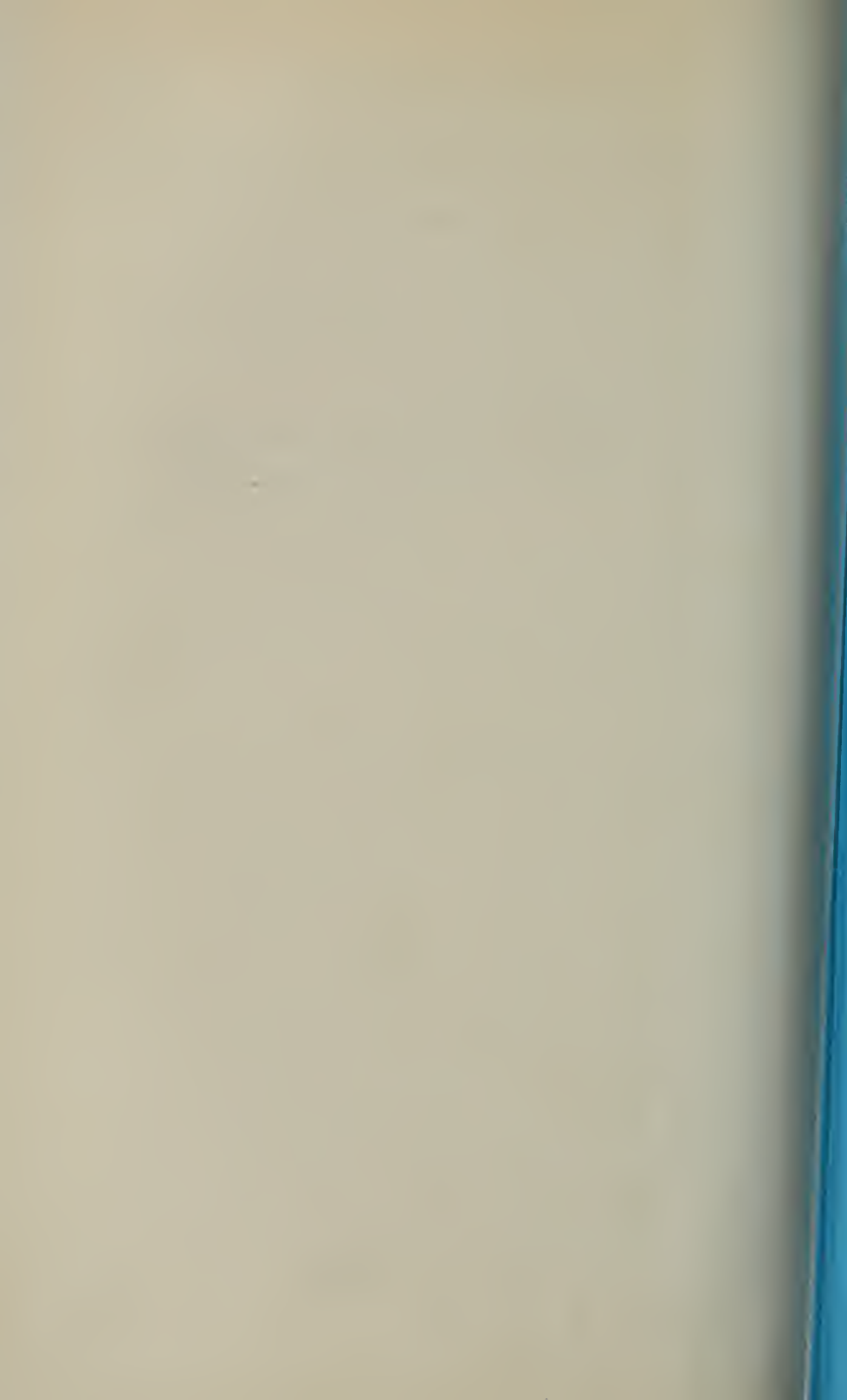


EXHIBIT "A"

PLAT OF
HOLLADAY'S ADDITION
TO EAST PORTLAND
As laid off February 1st 1871

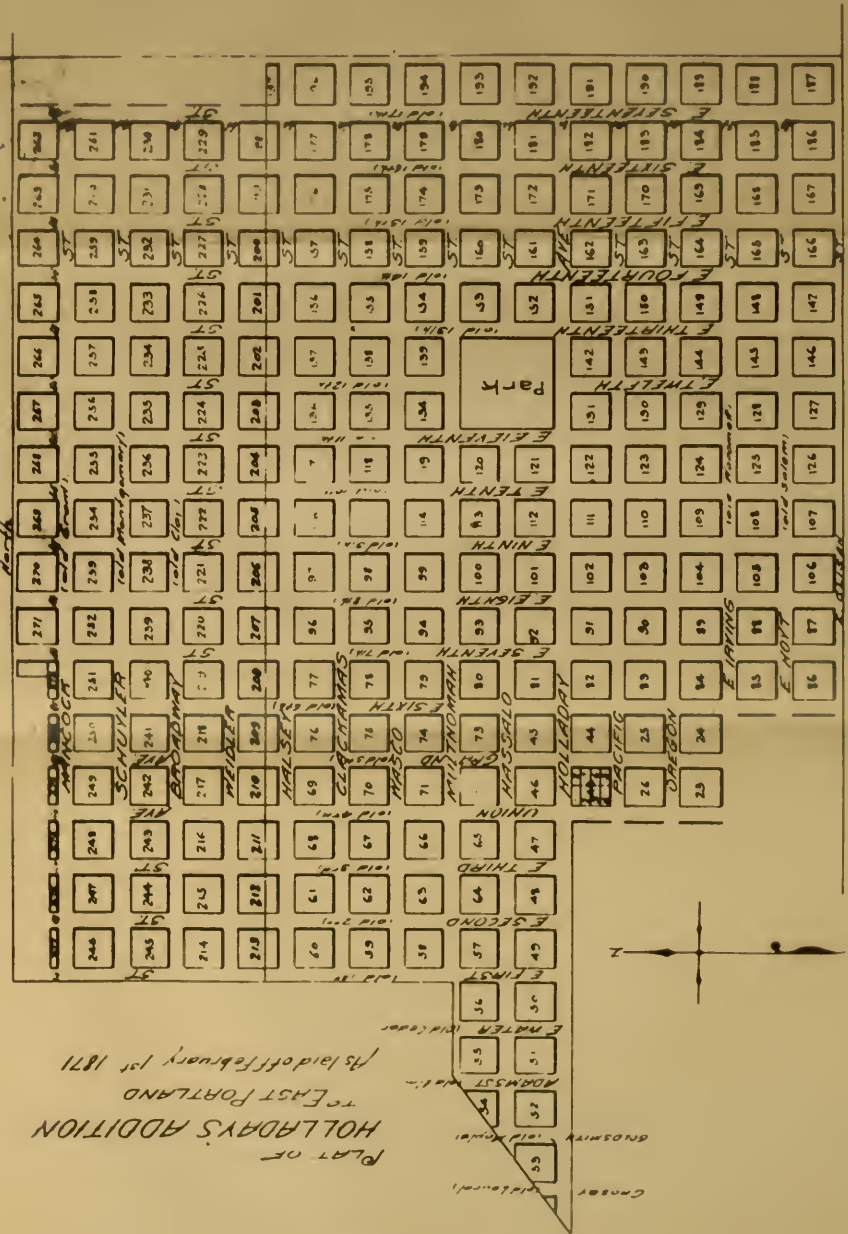


Exhibit "B."

Portland, Oregon, September 9, 1922.

To the Honorable Mayor and City Commissioners,
City of Portland,

Portland, Oregon.

Gentlemen:

At a meeting held at the Halladay School on Friday evening, September 8th, 1922, many residents of the district adjacent to the Holladay School being present, the question of the new Holladay School as proposed by the Board of Directors of School District No. 1, was discussed, particular importance and stress being laid on the matter of vacation of Clackamas Street between the west line of East 9th Street and the east line of East 7th Street; also East 8th Street between the south line of Halsey Street and the North line of Wasco Street.

It was the unanimous opinion of those present that these streets should be vacated in order to give adequate ground area for a school building and playgrounds. Particular importance was laid to the question of safety of the children who attend this school.

Therefore, we, the residents of the district adjacent to the proposed new Holladay School and residents of the City of Portland, petition your honorable body to proceed with the vacation of the streets above mentioned in order that School District No. 1 may proceed with the erection of the new Holladay School as originally planned.

(Said petition was marked Filed Sept. 15, 1922,
Placed on file.) [31]

Exhibit "C."

Portland, Oregon, August 4, 1922.

To the Honorable Mayor and Council of the City of
Portland, Oregon.

Gentlemen:

Now comes the undersigned, who desires the vacation of a certain portion of East 8th Street in the City of Portland, Multnomah County, Oregon, and respectfully shows:

That a particular description of the portion of said East 8th Street which petitioner herein desire to have vacated is all that portion of said East 8th Street which lies between the south line of Halsey Street and the north line of Wasco Street.

That the purpose for which the ground is proposed to be used which your petitioner herein seeks to have vacated is for general private purposes the same as the adjacent ground and particularly for residential purposes and school purposes.

That the reason for such vacation is that School District No. 1, Multnomah County, Oregon, owns the adjacent property on the west being block 96, the said School District contemplates the purchase of blocks 96, 97 and 98 of Holladay Addition and on which the proposed new Holladay School is to be located and the vacation of that portion of said street will add to and be beneficial to the public in connection with the said school.

That there is appended to this petition as a part

thereof and as a basis for such vacation and as a basis for the granting of the prayer of this petition, the consent of the owners in fee simple of at least two-thirds of the real estate fronting upon both sides of the portion of said East 8th Street which is proposed to be vacated estimated upon the frontage of the street, such frontage to commence at a line drawn equidistant from the termini of the portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and 200 feet in each direction from the termini thereof; that said consent is in writing and duly acknowledged before an officer authorized to take acknowledgments and said consent is attached to this petition marked Exhibit "A" and made a part hereof.

Wherefore, the undersigned, petitioner prays that upon the publication of due notice and proof of the same in accordance with the provisions of the ordinances of the City of Portland the portion of said East 8th Street hereinbefore described be vacated. [32]

Name of Owner.	Description of Property.
School District No. 1, Multnomah County, Oregon, by Frank L. Shull, Chairman, by R. E. Fulton, School Clerk.	Block 96 Holladay Addition.

(Corporate Seal.)

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, being owners of the respective lots and parcels of land set opposite our respective names, do hereby consent to the vacation of that portion of East 8th Street in the City of

Portland, Multnomah County, State of Oregon, lying between the south line of Halsey Street and the north line of Wasco Street and we do hereby represent and guarantee that we are lawfully seized in fee simple of the property set opposite our respective names.

IN TESTIMONY WHEREOF we have duly executed this instrument this 4th day of August, 1922.

Name of Owner.	Description of Property.
The Oregon Real Estate Company, by H. S. Reed, Secretary,	Lots 7 and 8 Block 94 Holladay's Addition to East Portland, also Blocks 95, 97 and 98 in Holladay Addition to East Portland.
School District No. 1, Multnomah County, Oregon, by Frank L. Shull, Chairman, by R. E. Fulton, School Clerk.	Block 96 Holladay Addition.
Fred Jennings,	Block 94, Lots 5 and 6 Holladay Addition.

(Duly acknowledged by the Oregon Real Estate Company by School District No. 1 of Multnomah County, and by Fred Jennings.) [33]

Exhibit "D."

Portland, Oregon, August 4, 1922.

To the Honorable Mayor and Council of the City of Portland, Oregon.

Gentlemen:

Now comes the undersigned, who desires the vacation of a certain portion of Clackamas Street in the City of Portland, Multnomah County, Oregon, State of Oregon, and respectfully shows:

That a particular description of the portion of said Clackamas Street which petitioner herein desires to have vacated is all that portion of said Clackamas Street which lies between the west line of East 9th Street and the east line of East 7th Street.

That the purpose for which the ground is proposed to be used for which your petitioner herein seek to have vacated, is for general private purposes the same as the adjacent ground and particularly for residential purposes and school grounds.

That the reason for such vacation is that School District No. 1, Multnomah County, Oregon, owns the adjacent property on the north, being block 77 and 96, and the said School District contemplates the purchase of Blocks 95, 97 and 98, of Holladay Addition and on which the proposed new Holladay School is to be located, and the vacation of that portion of said street will add to and be beneficial to the public in connection with said school.

That there is appended to this petition as a part thereof and as a basis of such vacation and as a basis for the granting of the prayer of this petition, the consent of the owners in fee simple of at least two-thirds of the real estate fronting upon both sides of the portion of the said Clackamas Street which is proposed to be vacated, estimated upon the frontage of the street, such frontage to commence at a line drawn equidistant from the termini of the portion of the said street proposed to be vacated and extending along such proposed vacation the entire length thereof and 200 feet in each direction from the termini thereof; that said consent is in

writing and duly acknowledged before an officer authorized to take acknowledgments and said consent is attached to this petition marked Exhibit "A" and made a part hereof.

Wherefore, the undersigned, petitioner prays that upon the publication of due notice and proof of the same in accordance with the provisions of the ordinances of the City of Portland the portion of said Clackamas Street hereinbefore described be vacated. [34]

Name of Owner.	Description of Property.
School District No. 1, Multnomah County, Oregon, by Frank L. Shull, Chairman, by R. E. Fulton, School Clerk.	Blocks 77, 96 Holladay Addition.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned being the owners of the respective lots and parcels of land set opposite our respective names, do hereby consent to the vacation of that portion of Clackamas Street in the City of Portland, Multnomah County, State of Oregon, lying between the west line of East 9th Street and the east line of East 7th Street and we do hereby represent and guarantee that we are lawfully seized in fee simple of the property set opposite our respective names.

IN TESTIMONY WHEREOF we have duly executed this instrument this 4th day of August, 1922.

Name of Owner.	Description of Property.
The Oregon Real Estate Company, by H. S. Reed, Secretary.	Lots 1 and A Block 115 in Holladay's Addition to East Portland, also Blocks 95, 97 and 98 in Holladay Addition to East Portland.
School District No. 1, Multnomah County, Oregon, by F. L. Shull, Chairman, by R. E. Fulton, School Clerk.	Blocks 77 and 96 Holladay Add.

(Duly acknowledged by the Oregon Real Estate Company. Duly acknowledged by School District No. 1 of Multnomah County, Oregon.)

(Said petitions and each of them are marked filed Sept. 8, 1922. George R. Funk, Auditor of the City of Portland. By E. W. Jones, Deputy.) [35]

Exhibit "E."

ORDINANCE No. —.

An Ordinance vacating that portion of East 8th Street which lies between the south line of Halsey Street and the north line of Wasco Street.

WHEREAS, due notice has been given by advertisement thereof for four weeks, to wit, from August 10, 1922, to September 7, 1922, both dates inclusive in the Daily Record-Abstract, the City Official Newspaper, published in the City of Portland, Multnomah County, State of Oregon, that at a regular meeting of the Council of said City to be held on the 13th day of September, 1922, a petition would be presented to said Council praying for the vacation of that portion of East 8th Street lying between the south line of Halsey Street and the north line of Wasco Street, in the City of Portland,

Multnomah County, State of Oregon, which said notice, together with due proof of publication thereof was filed in the office of the Auditor of said City of Portland on September 12, 1922, prior to the presentation of said petition to the Council, and

WHEREAS, The petition hereinbefore referred to was duly presented to said Council on said date, to wit, September 13, 1922, which said petition duly set forth a description of said portion of said street sought to be vacated and the reasons for such vacation and the purpose for which the ground is proposed to be used and said petition was duly signed by School District No. 1, Multnomah County, Oregon, and

WHEREAS, there was appended to said petition as a part thereof and as a basis for such vacation and as a basis for the granting of the prayer of said petition, the consent of the owners in fee simple of at least two-thirds of the real estate fronting upon both sides of the portion of said street proposed to be vacated, estimated upon the frontage of said portion of said street, such frontage commencing at a line drawn equidistant from the termini of said portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and two hundred feet in each direction from the termini thereof, which consent is in writing and duly acknowledged before an officer authorized to take acknowledgments and is attached to said petition and filed therewith with the Auditor of said City, and

WHEREAS, the Council, upon the presentation

of said petition and the filing of proof of publication of said notice, did fix a meeting of said council to be held on the 15th day of September, 1922, at 2 o'clock P. M. as the time for hearing said petition and any objections that might be filed thereto, and

WHEREAS, at said time so fixed for such hearing said petition was duly presented, heard and considered by the Council, and the Council continued such hearing to 8 o'clock P. M. on said 15th day of September, 1922, to which time the Council adjourned, and at said time, to wit, 8 o'clock P. M. on said 15th day of September, 1922, the Council further heard and considered said petition and objections thereto, and the Council did find, ascertain and determine and does now hereby find, ascertain and determine that all of the foregoing recited [36] facts are true, and that all the acts and things above recited have been duly done and performed as required by the charter and ordinances of said city, and that the consent of the owners in fee simple has been given of at least two-thirds of the real property fronting on both sides of said portion of said street proposed to be vacated estimated upon the frontage of said street, such frontage being as hereinbefore particularly set out, which consent is in writing, duly acknowledged before an officer authorized to take acknowledgments and was and is attached to and filed with said petition; that the public interest will not be prejudiced by the vacation of said portion of said street and that the objections and remonstrances filed against such petition should be denied and are overruled, and

WHEREAS, the Council did on said date, to wit, September 15, 1922, grant the prayer of said petition in its entirety, now, therefore,

The City of Portland does ordain as follows:

Section 1. The findings and actions hereinbefore recited are hereby made a matter of record and the Council of the City of Portland does hereby find and determine that all of the facts, matters and things hereinbefore recited are true, and that all of the acts and things above recited have been duly done and performed as hereinbefore set forth and as required by the charter and ordinances of said City of Portland. The Council further finds and determines that the consent of the owners of at least two-thirds of the real property fronting on both sides of said portion of said street proposed to be vacated, estimated upon the frontage of said street, such frontage commencing at a line drawn equidistant from the termini of said portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and 200 feet in each direction from the termini thereof, has been obtained, which consent of owners is in writing and duly acknowledged before an officer authorized to take acknowledgments and is and was attached to said petition and filed therewith with the Auditor of said City of Portland. The Council further finds and determines that the public interest will not be prejudiced by the vacation of said portion of said street, and each and all of the objections and remonstrances filed or made against said proposed vacation are hereby

denied and overruled, and said petition is hereby granted.

Section 2. All that portion of East 8th Street which lies between the south line of Halsey Street and the north line of Wasco Street, in the City of Portland, Multnomah County, Oregon, be and the same is hereby vacated, and the said vacation of said portion of said street is hereby made a matter of record. Said petitioner shall, within ten days after the taking effect of this ordinance, pay into the city treasury the cost of obtaining the necessary changes on the public records so as to indicate as required by the law such vacation.

Passed by the Council.

Approved: _____,

Mayor of the City of Portland.

Attest: _____,

Auditor of the City of Portland. [37]

Exhibit "F."

ORDINANCE No. —.

An Ordinance vacating that portion of Clackamas Street which lies between the west line of East 9th Street and the east line of East 7th Street.

WHEREAS, due notice has been given by advertisement thereof for four weeks, to wit, from August 10, 1922, to September 7, 1922, both dates inclusive, in the Daily Record-Abstract, the City Official Newspaper, published in the City of Portland, Multnomah County, State of Oregon, that at a regular meeting of the Council of said City to be held on the 13th day of September, 1922, a petition

would be presented to said Council praying for the vacation of that portion of Clackamas Street lying between the west line of East 9th Street and the east line of East 7th Street, in the City of Portland, Multnomah County, State of Oregon, which said notice, together with due proof of publication thereof was filed in the office of the Auditor of said City of Portland on September 12, 1922, prior to the presentation of said petition to the Council, and

WHEREAS, the petition hereinbefore referred to was duly presented to said Council on said date, to wit, September 13, 1922, which said petition duly set forth a description of said portion of said street sought to be vacated and the reasons for such vacation and the purpose for which the ground is proposed to be used and said petition was duly signed by Scholl District No. 1, Multnomah County, Oregon, and

WHEREAS, there was appended to said petition as a part thereof and as a basis for such vacation and as a basis for the granting of the prayer of said petition, the consent of the owners in fee simple of at least two-thirds of the real estate fronting upon both sides of the portion of said street proposed to be vacated, estimated upon the frontage of said portion of said street, such frontage commencing at a line drawn equidistant from the termini of said portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and two hundred feet in each direction from the termini thereof, which consent is in writing and duly acknowledged before an officer

authorized to take acknowledgments and is attached to said petition and filed therewith with the Auditor of said City, and

WHEREAS, the Council, upon the presentation of said petition and the filing of proof of publication of said notice, did fix a meeting of said Council to be held on the 15th day of September, 1922, at 2 o'clock P. M. as the time for hearing said petition and any objections that might be filed thereto, and

WHEREAS, at said time so fixed for such hearing said petition was duly presented, heard and considered by the Council, and the Council continued such hearing to 8 o'clock P. M. on said 15th day of September, 1922, to which time the Council adjourned, and at said time, to wit, 8 o'clock P. M. on said 15th day of September, 1922, the Council further heard and considered said petition and objections thereto, and the Council did find, ascertain and determine and does now hereby find, ascertain and determine that all of the foregoing recited facts are true, and that all the acts and things above recited have been duly done and performed as required by the charter and ordinances of said city, and that the consent of [38] the owners in fee simple has been given of at least two-thirds of the real property fronting on both sides of said portion of said street proposed to be vacated estimated upon the frontage of said street, such frontage being as hereinbefore particularly set out, which consent is in writing, duly acknowledged before an officer authorized to take acknowledgments and was and is attached to and filed with said petition; that the

public interest will not be prejudiced by the vacation of said portion of said street and that the objections and remonstrances filed against such petition should be denied and overruled, and

WHEREAS, the Council did on said date, to wit, September 15, 1922, grant the prayer of said petition in its entirety, now, therefore,

The City of Portland does ordain as follows:

Section 1. The findings and actions hereinbefore recited are hereby made a matter of record and the Council of the City of Portland does hereby find and determine that all of the facts, matters and things hereinbefore recited are true, and that all of the acts and things above recited have been duly done and performed as hereinbefore set forth and as required by the charter and ordinances of said City of Portland. The Council further finds and determines that the consent of the owners of at least two-thirds of the real property fronting on both sides of said portion of said street proposed to be vacated, estimated upon the frontage of said street, such frontage commencing at a line drawn equidistant from the termini of said portion of said street proposed to be vacated and extending along such proposed vacation the entire length thereof and 200 feet in each direction from the termini thereof, has been obtained, which consent of owners is in writing and duly acknowledged before an officer authorized to take acknowledgments and is and was attached to said petition and filed therewith with the Auditor of said City of Portland. The Council further finds and determines that the public

interest will not be prejudiced by the vacation of said portion of said street, and each and all of the objections and remonstrances filed or made against said proposed vacation are hereby denied and overruled, and said petition is hereby granted.

Section 2. All that portion of Clackamas Street which lies between the west line of east 9th Street and the east line of East 7th Street, in the City of Portland, Multnomah County, State of Oregon, be and the same is hereby vacated, and the said vacation of said portion of said street is hereby made a matter of record. Said petitioner shall, within ten days after the taking effect of this ordinance, pay into the city treasury the cost of obtaining the necessary changes on the public records so as to indicate as required by law such vacation.

Passed by the Council.

Approved: _____,

Mayor of the City of Portland.

Attest: _____,

Auditor of the City of Portland.

6502. Ordinance No. ——. An ordinance vacating that portion of Clackamas Street which lies between the west line of East 9th Street and the east line of East 7th Street. Sept. 15, 1922. Read 1 and 2 and up for 3d reading Sept. 27, '22.

Stamped on this "By order of Council."

Bill of Complaint. Filed September 23, 1922, at 10:35 A. M. G. H. Marsh, Clerk. [39]

AND AFTERWARDS, to wit, on the 23d day of September, 1922, there was issued out of said court, a subpoena ad respondendum, which with the marshal's return of service on the Oregon Real Estate Company, is in words and figures, as follows, to wit: [40]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed subpoena ad. resp. together with copy of complaint and order to show cause on the therein named Oregon Real Estate Co., by handing to and leaving a true and correct copy thereof with H. S. Reed, Secy., personally at Portland, in said District on the 23d day of September, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By Lee Morelock,

Deputy. [41]

(Title of the Court and Cause.)

Subpoena Ad Respondendum.

The President of the United States of America,
To the City of Portland, a Municipal Corporation, George L. Baker, Mayor Thereof, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, George R. Funk, Auditor of said City of Portland; also School District No. 1, Multnomah

County, Oregon, Including the City of Portland, a Body Politic and Corporation, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, Directors of said School District No. 1; also Oregon Real Estate Company, a Corporation, GREETING:

You, and each of you, are hereby commanded that you be and appear in said District Court of the United States, for the District of Oregon, at the courtroom thereof, in the City of Portland, in said District, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein J. B. C. Lockwood is complainant and you are defendants, and further to do and receive what our said District Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the Marshal of said District, or your Deputy, to make due service of this our writ of subpoena and to make due return of the same with your proceedings thereon into this Court within twenty days from this date.

Hereof fail not.

WITNESS the Honorable CHARLES E. WOLVERTON and the Honorable ROBERT S. BEAN, Judges of said Court, and the Seal thereof affixed at Portland, in said District, this 23d day of September, 1922.

[Seal]

G. H. MARSH,
Clerk.

By F. L. Buck,
Chief Deputy Clerk.

MEMORANDUM, Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*.

Returned and filed September 26, 1922. G. H. Marsh, Clerk. [42]

AND AFTERWARDS, to wit, on Saturday, the 23d day of September, 1922, the same being the 71st judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [43]

(Title of Court and Cause.)

Order to Show Cause.

In the above-entitled court and cause, the verified complaint treated as an affidavit upon which to base the application for temporary restraining order and injunction, having been presented to and considered by the Court, and it appearing that an emergency exists and that good cause exists for an early hearing of plaintiff's application for temporary restraining order in the above court and cause—

IT IS NOW ORDERED that the defendants and each of them are required to be and appear in the above court and cause on Tuesday, September 26, 1922, at the hour of 10 o'clock A. M. thereof, then

and there to show cause why an injunction *pendente lite* should not issue in the above cause.

September 23, 1922.

R. S. BEAN,
Judge.

Filed September 23, 1922. G. H. Marsh, Clerk.
[44]

AND AFTERWARDS, to wit, on the 26th day of September, 1922, there was duly filed in said court a motion of the defendants City of Portland et al. to dismiss the bill of complaint, in words and figures as follows, to wit: [45]

(Title of Court and Cause.)

Motion of City of Portland et al. to Dismiss Bill of Complaint.

Come now the defendants, The City of Portland, George L. Baker, Mayor, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, and George R. Funk, Auditor, of said City of Portland, and move that the bill of complaint herein and this suit be dismissed upon the following grounds:

1. That it appears upon the face of the complaint herein that the plaintiff is not entitled to the relief prayed for nor to any relief.

2. That it appears upon the face of the said complaint that the plaintiff has not sufficient interest in the subject matter of this suit to entitle him to the relief prayed for or [46] to any relief, in that it does not appear that the plaintiff will suffer any special or peculiar inconvenience or damage, or any

inconvenience or damage peculiar to him and not experienced by the public at large, by any closing of the streets mentioned in the complaint if such streets should be closed as a result of the passage of ordinances, copies of which are attached to the complaint.

3. That it appears upon the face of the complaint that the passage of ordinances, copies of which are attached to the complaint, is within the scope of the charter powers of the City of Portland, and within the scope of the powers duly delegated to said city under the Constitution and Laws of the State of Oregon, and that equity will not enjoin the passage of such ordinances.

4. That said complaint is deficient in that it is indefinite and uncertain and does not state the situation of plaintiff's property with reference to the parts of streets proposed to be vacated.

5. That the complaint does not set forth facts sufficient to give this court jurisdiction in this cause in that it fails to set forth the amount involved in litigation except by a conclusion of law.

6. That in vacating a street or part thereof the City of Portland acts judicially, and after a hearing, and such act is reviewable in the State courts in the ordinary course of law. This court, therefore, has no jurisdiction to entertain this suit.

FRANK S. GRANT,

H. M. TOMLINSON,

Attorneys for Defendants, The City of Portland,
George L. Baker, John M. Mann, C. A. Bigelow,
S. C. Pier, A. L. Barbur and George R. Funk.

Filed September 26, 1922. G. H. Marsh, Clerk.

[47]

AND AFTERWARDS, to wit, on the 26th day of September, 1922, there was duly filed in said court, a motion of School District No. 1, Multnomah County, Oregon, et al. to dismiss the bill of complaint, in words and figures as follows, to wit: [48]

(Title of Court and Cause.)

Motion of School District No. 1, Multnomah County, Oregon, et al. to Dismiss Bill of Complaint.

Come now School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon, and move the Honorable Court for an order dismissing the within suit on the ground and for the reason that the facts alleged in the complaint on file herein do not constitute a cause of suit against the above-named defendants or any of them.

STANLEY MYERS,

District Attorney,

SAM'L H. PIERCE,

Deputy District Attorney,

Attorneys for School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark,

George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon.

To the Plaintiff and His Attorney:

You will please take NOTICE that in the argument of the [49] above motion the within named defendants will contend that no facts are shown which entitle the plaintiff to bring this suit for the abatement of an alleged public nuisance, it not being made to appear that he will sustain damage differing in kind from that suffered by the general public; also that the defendants herein are not proper parties to a suit for an injunction, it appearing from the facts stated that they do not contemplate any action for closing the streets enumerated except upon the sanction of the local authorities.

STANLEY MYERS,

District Attorney,

SAM'L H. PIERCE,

Deputy District Attorney,

Attorneys for School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon.

Filed September 26, 1922. G. H. Marsh, Clerk.
[50]

AND AFTERWARDS, to wit, on Wednesday, the 27th day of September, 1922, the same being the 77th judicial day of the regular July term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [51]

(Title of Court and Cause.)

Order Denying Petition for Temporary Restraining Order and Injunction.

This cause was heard by the Court on the petition of plaintiff for a temporary restraining order herein, and upon the motions to dismiss of the City of Portland et al. and of School District No. 1, Multnomah County, Oregon, et al., and was argued by Mr. Isham N. Smith, of counsel for plaintiff, and by Mr. H. M. Tomlinson, of counsel for the City of Portland et al., and by Mr. Samuel H. Pierce, of counsel for School District No. 1, Multnomah County, Oregon, et al.

Upon consideration whereof, IT IS ORDERED that said petition for a temporary restraining order and injunction herein be, and the same is hereby, denied; and

IT IS FURTHER ORDERED that both of said motions to dismiss be, and the same is hereby, denied. [52]

AND AFTERWARDS, to wit, on the 19th day of October, 1922, there was duly filed in said court an amendment to the bill of complaint, which, with proof of service on the defendant Oregon Real Estate Company, in words and figures as follows, to wit: [53]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed amendment to complaint on the therein-named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with H. S. Reed, Secretary, personally, at Portland, in said District, on the 17th day of October, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By Frank Snow,

Deputy. [54]

(Title of Court and Cause.)

Amendment to Bill of Complaint.

Plaintiff, by leave of Court first had and obtained, files this his amendment to his complaint, and alleges:

I.

That plaintiff attaches hereto as Exhibit "G" a true copy of the deed from defendant Oregon Real Estate Company to this plaintiff heretofore referred

to, and prays that said deed be read as a part hereof.

II.

That Holladay Addition was platted and dedicated, and the streets and thoroughfares and parks therein were platted and dedicated, in accordance with and as a part of a general plan to make said Holladay Addition desirable for and as a residential section of the former City of East Portland, and that when such former municipality was consolidated with the [55] City of Portland in 1891 such plan then existed and was well known, and the defendant Oregon Real Estate Company had inserted in every deed of conveyance of residence property executed by it prior to the execution of the deed to this plaintiff restrictive covenants of use and sale of similar import to those contained in this plaintiff's deed. That the Oregon Real Estate Company has sold numerous lots and tracts of land in said Holladay Addition as per said recorded plat and has made said recorded plat by reference a part of each deed of conveyance affecting property in said addition conveyed by it.

III.

At the time of the purchase of plaintiff's property as shown in his deed marked Exhibit "G" the said streets affected by the proceedings herein complained of were then, and hence hitherto each of said streets have been and now are appropriate and useful adjunct to the lands of plaintiff and form part of the means of ingress and egress to and from said lands. That after plaintiff purchased his said

lots, all the streets and thoroughfares in Holladay's Addition were hard surfaced and improved, and such improvements were made at the expense of the property owners within said district, and this plaintiff has paid for street improvements of the property so bought by him approximately the sum of \$1,978.60 with interest. That since the improvement of said streets each and both thereof throughout their length have been and now are in fine state of repair, and have been constantly used and are now used, and each and both of said streets furnishes, and is a convenient use and way of ingress and egress to and from and throughout Holladay Addition, and the connecting street with said City of Portland.

At the time this plaintiff purchased his said lots he was led to believe, and did believe, that said lots were in the midst of the restricted district and the use of his lots was restricted as per his said deed. That this plaintiff, upon the belief that the streets and ways shown on said plat were public ways and would remain as such, as well as depending upon the restriction contained in his deed, and believing that his property was located within a restricted residence district, constructed a dwelling-house on part of his said property and otherwise improved said property at the cost of many thousands of dollars, all of which was known to and is now known to defendants herein, or which by reasonable inquiry could be learned by defendants and each of them.

That the existence of the streets and thoroughfares shown in said plat and of the restrictions for the use of the property as above recited, gave an added value to plaintiff's lots and entered into and formed a part of the consideration of the purchase of his said property.

IV.

That the defendant School District intends to use the property which it acquires under its contract from the Oregon Real Estate Company, referred to in the complaint and the supplemental [56] complaint, for purposes other than residential purposes, to wit, for the purposes of maintaining and erecting public school buildings, playgrounds and structures for public school purposes upon, across and over said blocks 95, 97 and 98, and the vacated portions of each of said streets, and thereby perpetually and forever to devote said premises and every part thereof to purposes other than residential purposes, and that the erection of such school buildings and the use of said premises for school purposes and school playground purposes will deprive this plaintiff of the right to have said property, to wit, all of Blocks 95, 97 and 98, devoted solely to residential purposes as hereinbefore set forth, and of his right to have the portions of said vacated streets used for street purposes.

V.

That the existence of the proposed public school and the public school playgrounds as heretofore alleged and the devotion of said blocks, and the vacated portions of said streets, to public school

purposes instead of residential purposes will greatly depreciate and injure the value of this plaintiff's property, and will impair its desirability for residence purposes, and that the injury thereby inflicted upon plaintiff and his said property is different in kind from that suffered by the general public and is peculiar to plaintiff and his said property and to those similarly situated with plaintiff alone.

VI.

That neither of said ordinances attached to the complaint marked Exhibits "E" and "F" provides for any means or method of ascertaining plaintiff's damages nor any means or [57] method of paying plaintiff for such damages, and that each and both of said ordinances attempt to take plaintiff's property and his property rights without compensation and to devote plaintiff's property rights and rights of easement to the private use of Oregon Real Estate Company for sale without compensating the plaintiff in any manner therefor.

VII.

That the defendants and each of them knows and has means of knowledge, by means of reference to plaintiff's recorded deed of the covenants and restrictions inserted therein, and by reference to the recorded plat each of said defendants has knowledge and means of knowledge of the existence of the streets and thoroughfares in Holladay's Addition as shown thereon and of each fact shown by said recorded plat.

VIII.

That defendant Oregon Real Estate Company, in

signing the consent of property owners to the vacation of each portion of each of such streets, and in entering into a contract for the sale of said Blocks 95, 97 and 98, Holladay's Addition aforesaid, and the vacated portions of each of said streets, and in consenting to the use of said Blocks 95, 97 and 98, Holladay Addition aforesaid, as well as the vacated portions of each of said streets, for school purposes, has committed a fraud and a wrong upon this plaintiff and his said property, which is remediless at law, and that the actions of the defendants School District and Oregon Real Estate Company in changing and diverting from residential purposes to school purposes the property within Blocks 95, 97 and 98, Holladay's Addition aforesaid, and in changing the vacated portions of said streets to school grounds, are a fraud and a wrong upon [58] this plaintiff's contractual and vested rights, and a breach of the covenants and warranties set forth in plaintiff's deed and of the conditions and the particulars appearing on the plat of dedication attached to the complaint as Exhibit "A."

IX.

That the damages so inflicted upon the estate of this plaintiff as above alleged are remediless at law and that the injuries complained of will result in great and irreparable injury and damage to this plaintiff and his estate which cannot be adequately compensated at law.

X.

That at the time of the making of the original plat and dedication of Holladay's Addition to the

shall revert to the grantor herein, its successors and assigns.

Second—During the period of twenty years from the date hereof the herein granted premises shall not be occupied by any shop, store, livery stable, foundry or other places of business, nor used for the carrying on of any trade, or business, whatever, but shall, when in use, be used solely for residence purposes, nor shall the said premises be used or occupied at any time by Chinese, and if either of these conditions be broken by the grantee herein his assigns or legal representatives, this deed shall become null and void, and the title to the herein granted premises shall revert to the grantor herein, its successors and assigns.

TO HAVE AND TO HOLD, the above described and granted premises, subject to the conditions herein contained, unto the said J. B. C. Lockwood his heirs and assigns forever. And the said OREGON REAL ESTATE COMPANY the grantor above named, does covenant to and with J. B. C. Lockwood the above named grantee his heirs and assigns, that the above granted premises are free from all incumbrances, and that it will warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, the grantor above named, has hereunto [61] set its seal this sixth day of April, A. D. 1908.

THE OREGON REAL ESTATE COMPANY,

By C. X. LARRABEE,

President.

THE OREGON REAL ESTATE COMPANY,

[Corporate Seal] By MARTIN D. WHITE,

Secretary.

Executed in the presence of

LOUIS KING.

SAM J. BESWICK.

State of Oregon,

County of Multnomah,—ss.

BE IT REMEMBERED, that on this sixth day of April, A. D. 1908, before me, the undersigned, a Notary Public in and for the said County of Multnomah, and State of Oregon, duly commissioned and qualified, personally came C. X. Larrabee, president of the Oregon Real Estate Company, and Martin D. White, Secretary of the Oregon Real Estate Company, whose names are subscribed to the foregoing instrument as parties thereto, and as such President and such Secretary of said Oregon Real Estate Company, both personally known to me to be the individuals named and described in, and who executed the said instrument, and they severally acknowledged to me that he, the said C. X. Larrabee as such President, and he, the said Martin D. White as such Secretary of the Oregon Real Estate Company, executed the foregoing instrument as and for the act and deed of

said Oregon Real Estate Company, freely and voluntarily, and for the uses and purposes therein mentioned; and he, the said Martin D. White being by me duly sworn, did depose and say that he is the Secretary of the Oregon Real Estate Company, and resides at Portland, Multnomah County, Oregon; that he is the legal custodian of, and is acquainted with, and has in his possession the Corporate Seal of the Oregon Real Estate Company; that the seal affixed to the foregoing instrument is such Corporate Seal; that the same was so affixed by him as such Secretary of said Company on the sixth day of April, A. D. 1908, by order of the Board of Directors of said Company, and that he signed his name thereto by like order of the Board of Directors of said Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at the City of Portland, Oregon, the date first above written.

[Notarial Seal]

SAM J. BESWICK,

Notary Public for Oregon.

Rec. for record April 6, 1908, at 3:39 P. M.

Recorded in Record of Deeds 417, page 332.

Service admitted Portland, Oregon, Oct. 17, 1922.

H. M. TOMLINSON,

Attorney for City of Portland and Commissioners,

S. H. PIERCE,

Attorney for Defendant School District and Its Directors.

Filed October 19, 1922. G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on the 19th day of October, 1922, there was duly filed in said court a supplemental bill of complaint, with proof of service on defendant Oregon Real Estate Company, *is* in words and figures as follows, to wit: [63]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify that I served the annexed supplemental complaint on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with H. S. Reed, Secretary, personally, at Portland, in said District, on the 17th day of October, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By Frank Snow,

Deputy. [64]

(Title of Court and Cause.)

Supplemental Bill of Complaint.

Plaintiff, by leave of Court first had and obtained, files this his supplemental bill of complaint and alleges:

I.

That since the institution of this suit and on, to wit, the 27th day of September, 1922, the defendants the City of Portland, acting through its mayor, George L. Baker, and its commissioners, A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier,

has passed the ordinances copies of which are attached to the complaint as Exhibits "E" and "F," and said ordinances so passed have been duly signed by the mayor, attested by the defendant Funk, city auditor, and have been filed and are preserved, and the record thereof has been made in a book kept for that purpose marked "Ordinance Record" of the City of Portland. [65]

That by the provisions of Section 48 of the Charter of the City of Portland in effect July 1, 1913, as revised by the council August 19, 1914, it is provided:

"Ordinances (a) making appropriations and the annual tax levy, (b) relative to local improvements and assessments therefor, and (c) emergency ordinances, shall take effect immediately upon their passage. All other ordinances enacted by the Council shall take effect thirty days after their passage, unless a later date is fixed therein, in which event they shall take effect at such later date, subject to the referendum and subject to the provisions of Section 52 of this Charter."

II.

This plaintiff is informed and believes, from statements made by the defendant William F. Woodward, acting on behalf of the defendant School District and on behalf of the other directors of said School District who are defendants herein, that the defendant School District and the defendant Oregon Real Estate Company have entered a contract for the purchase by said School District

from said Oregon Real Estate Company of Blocks 95, 97 and 98, Holladay's Addition to Portland, Oregon, aforesaid, together with those portions of the streets affected by said ordinances which upon vacation of said streets would revert to said Oregon Real Estate Company as owner of the abutting property; and plaintiff further alleges that the defendant School District has entered into and taken possession of some or all of said blocks 95, 97 and 98 under its contract of purchase.

III.

That the defendant School District and Oregon Real Estate Company intend to, and will unless restrained by order of this Court as heretofore sought, from and after the effective date of said ordinance take possession of the vacated portions of the streets described in Exhibits "E" and "F" attached [66] to the complaint, and will tear up and destroy the improvements thereon, and will convert and are now taking steps to convert the vacated portions of each of said streets to the use and benefit of the defendants Oregon Real Estate Company and the School District, and that the defendant City of Portland and its mayor and commissioners threaten to, and unless restrained by order of this Court will, permit said defendants School District and Oregon Real Estate Company so to take possession of the vacated portions of the streets described in Exhibits "E" and "F" and to destroy the improvements thereon, and to appropriate and adopt said vacated portions of each of said streets to the sole and separate use of the

defendants School District and Oregon Real Estate Company, and said defendants acting together threaten to, and unless restrained by this Court will, exclude the general public from the use of such vacated portions of said streets and each of them as streets, highways and thoroughfares, and threaten to and will, unless restrained by order of this Court, deprive this plaintiff and others similarly situated with plaintiff of their private rights, easements and rights of way over, along, across and through such vacated portions of said streets and each of them, and thereby the defendants acting together threaten to and will, unless restrained by order of this Court, deprive this plaintiff and others similarly situated with plaintiff of his rights of ingress and egress over, along, across and upon the vacated portions of each of said streets, and will destroy his private rights of way along, across and over such vacated portions of each of said streets, and will deprive him of his property and easements therein and thereover without due or any process of law. [67]

IV.

That neither or any of said defendants has ever offered to this plaintiff or has made provision to pay to this plaintiff any compensation or renumeration for the destruction of his rights of easement and rights of way and of ingress and egress over, along, upon and across the vacated portions of said streets, or either of them, and that the defendants acting together are threatening to and will, unless restrained by order of this Court, appro-

priate and take over this plaintiff's said easement and rights of way along, across, over, and upon the vacated portions of said streets and each of them, without compensation.

V.

That by the vacation of those portions of each of said streets affected by this proceeding, the property of this plaintiff, which he so purchased from the defendant Oregon Real Estate Company as above alleged, will be greatly depreciated in value by the proposed vacation and occupation of those portions of said streets and each of them as heretofore shown, and that the injury and damage to these plaintiffs or his property rights is of a special or peculiar kind and is not such damage or injury as the general public may suffer by the vacation of said streets.

VI.

That the defendant School District threaten to use all of the vacated portion of said streets for school purposes and to erect and construct and maintain on the property acquired by it from the defendant Oregon Real Estate Company a public school building or buildings and playgrounds, and by the maintenance of such public school building and playgrounds and the devotion of said property so acquired by said School District from the Oregon Real Estate Company, the property [68] of this plaintiff heretofore described herein will be greatly depreciated in its value, in its marketability, and in its salability, to plaintiff's damage, and the damage so inflicted upon plaintiff's property

is peculiar and personal to himself and his property, and it is a damage of a different kind to that suffered by the general public by the erection and construction of said school buildings and by the appropriation of said property for schoolhouse purposes and school playground purposes as aforesaid.

VI.

That this plaintiff has acquired easement, rights of way and of ingress and egress to, over and across each portion of each street so vacated as herein alleged, and is entitled to have each of said portions of said streets kept open and used only as a street, and that defendant Oregon Real Estate Company and defendant School District and each of them are and ought to be estopped from diverting said portions of each of said streets, or any part thereof from street purposes and from appropriating, devoting or using the vacated portions of each of such streets to any other use than street purposes.

VIII.

That said ordinances so passed by the defendant City of Portland acting through its mayor and council as aforesaid are, and each of them is, void in this:

(a) That neither of said ordinances purports to create or provide any fund whatsoever or to provide a way or means for raising funds to compensate this plaintiff for any damages which he suffers as above alleged, or for any part of said damages;

(b) That each of said ordinances attempts to vacate the respective portions of the streets referred to therein [69] without in any manner providing for any means or method of determining the damages which this plaintiff will suffer by reason thereof, and the defendants School District and Oregon Real Estate Company are threatening to and will, unless restrained by this Court, appropriate said vacated portions of each of said streets to their own use without compensating this plaintiff in any manner for his damages occasioned thereby;

(c) That each of said ordinances is further void by reason of the facts specified in the original complaint herein.

WHEREFORE plaintiff, J. B. C. Lockwood, prays that the relief asked in his original complaint be granted, and for general relief, and especially for the following relief:

First. For a mandatory injunction against the City of Portland restraining it from vacating and abandoning said portions of said streets, and compelling it to restore said streets to public streets, and more especially as easements and rights of way which this plaintiff has acquired under his deed aforesaid;

Second. That the defendants School District and Oregon Real Estate Company and each of them be enjoined and restrained from using any portion of the streets so vacated for other than street purposes;

Third. That each and all of said defendants be restrained and enjoined from using any or either of the vacated portions of each and both of said streets for any purpose inconsistent with the continuous use thereof as an open public street;

Fourth. That plaintiff recover his costs.

ISHAM N. SMITH,
Attorney for Plaintiff.

(Duly verified by counsel for plaintiff.) [70]
Service admitted, Portland, Ore., Oct. 17, 1922.

H. M. TOMLINSON,
Attorney for City of Portland and Its Mayor and
Commissioners.

S. H. PIERCE,
Attorney for Defendant School District and Its
Directors.

Filed October 19, 1922. G. H. Marsh, Clerk.
[71]

AND AFTERWARDS, to wit, on the 23d day of October, 1922, there was duly filed in said court a motion of the defendant City of Portland et al. to dismiss the amendment to bill of complaint and the supplemental bill of complaint, in words and figures as follows, to wit: [72]

(Title of Court and Cause.)

**Motion of City of Portland et al. to Dismiss
Amendment to Bill of Complaint and Supple-
mental Bill of Complaint.**

Come now the defendants, The City of Portland,
George L. Baker, Mayor, A. L. Barbur, Commis-

sioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, and George R. Funk, Auditor, of said City of Portland, and move that the complaint, amendment to complaint, and supplemental complaint herein, be dismissed as to these defendants, upon the following grounds:

1. That it appears upon the face thereof that the plaintiff is not entitled to the relief prayed for nor to any relief.

2. That it appears upon the face thereof that the plaintiff has not sufficient interest in the subject matter [73] of this suit to entitle him to the relief prayed for or to any relief, in that it does not appear that the plaintiff will suffer any special or peculiar inconvenience or damage, or any inconvenience or damage peculiar to him and not experienced by the public at large, by any closing of the streets mentioned in the complaint if such streets should be closed.

3. That it appears upon the face of said supplemental complaint that the act of passing the ordinances attached to the complaint and marked, respectively, "E" and "F," which act plaintiff seeks to enjoin, has already been performed and accomplished.

4. That it appears upon the face of said complaint, amendment to complaint, and supplemental complaint, that the passage of said ordinances is within the scope of lawful power of the City of Portland and the Council of said city.

5. That the complaint does not set forth facts

sufficient to give this court jurisdiction in this cause in that it fails to set forth the amount involved in litigation except by a conclusion of law.

6. That in passing said ordinance to vacate said parts of streets the council of the City of Portland acted judicially, and after a hearing, and said act is reviewable in the state courts in the ordinary course of law. This Court, therefore, is without jurisdiction to entertain this suit.

FRANK S. GRANT,

H. M. TOMLINSON,

Attorneys for Defendants, The City of Portland,
George L. Baker, Mayor, A. L. Barbur, Commissioner, John M. Mann, Commissioner, S. C. Pier, Commissioner, George R. Funk, Auditor,
of said City of Portland.

Filed October 23, 1922. G. H. Marsh, Clerk.
[74]

AND AFTERWARDS, to wit, on the 23d day of October, 1922, there was duly filed in said court a motion of defendant School District No. 1, Multnomah County, Oregon, et al., to dismiss amendment to bill of complaint and supplemental bill of complaint, in words and figures as follows, to wit: [75]

(Title of Court and Cause.)

Motion of School District No. 1, Multnomah County, Oregon, et al. to Dismiss Amendment to Bill of Complaint and Supplemental Bill of Complaint.

Come now School District No. 1, Multnomah

County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, directors of School District No. 1, Multnomah County, Oregon, and move the Honorable Court for an order dismissing the within suit on the grounds and for the reason that the facts alleged in the complaint, amendments to the complaint and supplemental complaint on file herein do not constitute a cause of suit against the above-named defendants or any of them.

STANLEY MYERS,

District Attorney.

SAML. H. PIERCE,

Deputy District Attorney,

Attorneys for School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon.

To the Plaintiff and to His Attorney:

You will please take NOTICE that in the argument of the above motion the within named defendants will contend that no facts are alleged which entitle the plaintiff to the relief prayed for, in the following particulars, to wit:

1. That no facts are alleged showing that the amount involved in this controversy exceeds \$3,000, exclusive of interest and costs, and therefore that this court has no jurisdiction to hear and determine this suit. [76]

2. That the allegations to the effect that the plaintiff has individual rights in the streets to be closed are immaterial, irrelevant and incompetent for the reason that the said individual rights, if any, were acquired subject to the paramount right of the state and of the City of Portland to vacate said streets and close them to public travel; that the allegations to the effect that said School District No. 1 acquired said property subject to certain restrictions as to its use are irrelevant, immaterial and incompetent, in view of the fact that no remedy is demanded in connection therewith.

3. That there is no allegation that the ordinances heretofore enacted by the City of Portland are in any manner irregular or illegal or that the defendants therein are proceeding to act upon an illegal or a void ordinance in obstructing said streets.

STANLEY MYERS,

District Attorney.

SAM'L H. PIERCE,

Deputy District Attorney.

Attorneys for School District No. 1, Multnomah County, Oregon, William F. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, George B. Thomas and F. C. Pickering, Directors of School District No. 1, Multnomah County, Oregon.

Filed October 23, 1922. G. H. Marsh, Clerk
[77]

AND AFTERWARDS, to wit, on Monday, the 13th day of November, 1922, the same being the 7th judicial day of the regular November term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [78]

(Title of Court and Cause.)

Order Sustaining Motions to Dismiss Amendment to Bill of Complaint and Supplemental Bill of Complaint.

This cause was heard by the Court upon the respective motions of the City of Portland et al. and of School District No. 1, Multnomah County, Oregon, et al. to dismiss the complaint, amendment to the complaint and supplemental complaint herein, and was argued by Mr. I. N. Smith, of counsel for plaintiff, and by Mr. H. M. Tomlinson and Mr. Samuel A. Pierce, of counsel. And the Court being fully advised in the premises, upon consideration thereof—

IT IS ORDERED that said motions be and they are hereby allowed, that said complaint herein be and the same is hereby dismissed, that plaintiff take nothing by this action, and that said defendants do have and recover of and from said plaintiff their costs and disbursements herein taxed in the sum of \$——.

R. S. BEAN,
Judge.

Filed November 13, 1922. G. H. Marsh, Clerk.
[79]

AND AFTERWARDS, to wit, on the 15th day of December, 1922, there was duly filed in said court a petition for appeal and allowance of appeal, which with proof of service on defendant Oregon Real Estate Company, is in words and figures as follows, to wit: [80]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed petition for appeal and allowance on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney of the Oregon Real Estate Company, personally, at Portland, in said District, on the 13th day of December, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By A. Davidson,

Deputy. [81]

(Title of Court and Cause.)

Petition for Appeal and Order Allowing Same.

To the Honorable ROBERT S. BEAN, Judge of the
District Court of the United States for the Dis-
trict of Oregon:

The above-named plaintiff, J. B. C. Lockwood, considering himself aggrieved by the decree entered in the above-entitled court on the 13th day of November, 1922, in the above-entitled cause, does hereby appeal from said decree to United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and prays that an appeal be allowed and a citation issue as provided by law, and that a transcript of the record and proceedings upon which said decree was based, duly authenticated, may be sent to the United States *Circuit* [82] *of Appeals* for the Ninth Circuit.

Your petitioner further prays that a proper order touching the security to be required in order to perfect this appeal be made, and upon the filing of said bond said appeal may become effective.

Dated December 2, 1922.

ISHAM N. SMITH,
418 Mohawk Building, Portland, Oregon,
Attorney for Plaintiff.

ORDER.

The foregoing petition is granted, and the appeal is allowed in the above-entitled cause, and it is ordered that an appeal bond herein be fixed at the sum of five hundred dollars (\$500.00).

Dated this 5th day of December, 1922.

R. S. BEAN,
Judge.

Filed December 15, 1922. G. H. Marsh, Clerk.
[83]

AND AFTERWARDS, to wit, on the 15th day of December, 1922, there was duly filed in said court an assignment of errors, which with proof of service on defendant Oregon Real Estate Company is in words and figures as follows, to wit: [84]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed assignment of errors on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney of the Oregon Real Estate Co., personally, at Portland, in said District, on the 13th day of December, A. D. 1922.

CLARENCE R. HOTCHKISS,
U. S. Marshal.
By A. Davidson,
Deputy. [85]

(Title of Court and Cause.)

Assignment of Errors.

Comes now plaintiff and files the following assignment of errors upon which he will rely upon the prosecution of his appeal from the decree made by this Honorable Court on the 13th day of November, 1922, in the above-entitled court.

The Court erred:

I.

In holding and deciding that the motion to dismiss the above cause on the original complaint, as well as the amendment to the complaint and supplementary complaint, was well taken.

II.

The Court erred in dismissing said cause upon the motion of the defendants, the City of Portland, and its respective officers, George L. Baker, Mayor, A. L. Barbur, John [86] M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor.

III.

The Court erred in dismissing said cause on the motion of the defendant School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic and corporate, and its directors W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering.

IV.

The Court erred in not overruling said motion

and in refusing to issue the injunction prayed for in said cause, for the following reasons:

(a) The plaintiff J. B. C. Lockwood purchased property as alleged in the complaint according to the recorded plat of Holladay's Addition, Portland, Oregon;

(b) By such purchase he acquired a private easement and right of way over, along, and across all of the streets and thoroughfares designated on said plat;

(c) The defendant the City of Portland and its officers and the defendant School District No. 1 and its officers and defendant Oregon Real Estate Company have conspired together to take from plaintiff his rights of way and easements over and across the designated portions of the streets vacated by this controversy, without compensation, without public necessity, and contrary to law, and in violation of the rights of plaintiff guaranteed by both the state and federal Constitutions as set forth;

(d) This suit to quiet plaintiff's title in and to the designated portions of streets in controversy is his only remedy; no remedy at law is adequate to compensate plaintiff for his [87] estate or his rights of ingress and egress to and over his property described in this complaint, over, along and across the designated portions of the streets in Holladay's Addition, Portland, Oregon, vacated by the proceedings complained of;

(e) By plaintiff's deed he acquired private rights of way over and along said streets and all

of them, and appropriate rights of ingress and egress to and over his property described in the complaint, which is a different property from that of the general public in said streets and highways, and is a private property of the plaintiff, and by the proceedings complained of defendants and each of them have sought to take and by the decree of the Honorable District Court of the State of Oregon they are permitted to take, the private property and the private property rights of this plaintiff in real estate without compensation, without public reason or necessity therefor, and without making provision for the payment to plaintiff of damages which he suffers thereby;

(f) The ordinances of the City of Portland purporting to vacate said streets are, and each of them is, void as to the private right of this plaintiff sought to be enforced by this proceeding.

V.

The Court erred in sustaining the motion of defendants to dismiss said cause and in holding and deciding that the complaint did not state facts sufficient to constitute grounds for remedy in equity, and in holding and deciding that plaintiff's remedy, if any, is at law, and dismissing said bill.

WHEREFORE plaintiff, J. B. C. Lockwood, prays that judgment and decree of said District Court of the United States [88] for the District of Oregon be reversed, and that plaintiff be restored to his rights.

ISHAM N. SMITH,
418 Mohawk Building, Portland, Oregon,
Attorney for Plaintiff.

Filed December 15, 1922. G. H. Marsh, Clerk.
[89]

AND AFTERWARDS, to wit, on the 15th day of December, 1922, there was duly filed in said court a bond of appeal, which with proof of service on defendant Oregon Real Estate Company is in words and figures as follows, to wit: [90]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed appeal bond on the therein named Oregon Real Estate Company, by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney of Oregon Real Estate Co., at Portland, in said District, on the 13th day of December, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By A. Davidson,

Deputy. [91]

(Title of Court and Cause.)

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, J. B. C. Lockwood, as principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and authorized under the laws of the State of Oregon to become surety upon bonds,

with its principal office in said State of Oregon at Portland, Oregon, are held and firmly bound unto the above-named defendants, the City of Portland, a municipal corporation, George L. Baker, Mayor thereof, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, George R. Funk, Auditor of said City of Portland; also School District No. 1, Multnomah County, Oregon, including the City of Portland, a body politic and corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, [92] W. J. H. Clark, J. E. Martin, George B. Thomas, and F. C. Pickering, Directors of said School District No. 1, also Oregon Real Estate Company, a corporation, in the sum of five hundred dollars (\$500.00) lawful money of the United States, to be paid to them and to their respective executors, administrators and assigns, jointly and severally, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators and successors, by these presents.

Sealed with our seals and dated this 9th day of December, 1922.

Yet upon this express condition:

That WHEREAS the above-named J. B. C. Lockwood has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the United States District Court for the District of Oregon entered in the above cause on November 13, 1922:

NOW, THEREFORE, the condition of this obligation is such that if the above-named J. B. C. Lockwood shall prosecute his said appeal to effect and answer all costs, damages and disbursements, if he should fail to make good his plea, which may be awarded against him, then this obligation shall be void; otherwise to remain in full force and effect.

Dated December 12, 1922.

J. B. C. LOCKWOOD,

By ISHAM N. SMITH,

His Attorney and Attorney in Fact.

HARTFORD ACCIDENT & INDEMNITY
COMPANY.

By J. T. KERN,

Attorney in Fact.

Approved:

CHAS. E. WOLVERTON,

Judge.

[Seal of Surety Company]

Attest: _____,

Attorney in Fact. [93]

United States of America,
State and District of Oregon,
Multnomah County,—ss.

On this 8th day of December, 1922, before me, the undersigned, Ivy Gay, a notary public in and for the State of Oregon, residing at Portland, Oregon, personally appeared Isham N. Smith, agent and attorney in fact for J. B. C. Lockwood, plaintiff, and J. T. Kern, agents and attorneys in fact for Hartford Accident & Indemnity Company, a corporation, above named, known to me to be the per-

sons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same in behalf of their respective principals and in the capacity therein stated.

Witness my hand and seal at Portland, Oregon, the 9th day of December, 1922.

[Seal]

IVY GAY,

Notary Public for Oregon, Residing at Portland, Multnomah County, therein.

My commission expires February 20, 1926.

Filed December 15, 1922. G. H. Marsh, Clerk.

[94]

AND AFTERWARDS, to wit, on the 15th day of December, 1922, there was duly filed in said court a praecipe for transcript, which with proof of service on defendant Oregon Real Estate Company is in words and figures as follows, to wit: [95]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed praecipe on the therein named Oregon Real Estate Company by handing to and leaving a true and correct copy thereof with John A. Laing, Assistant Secretary and Attorney for the Oregon Real Estate Co., personally, at Portland, in said District, on the 18th day of December, A. D. 1922.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By A. Davidson,
Deputy. [96]

Praeceptum for Transcript of Record.

Honorable George H. Marsh, Clerk of the Above Court:

Please prepare and certify for the appeal of plaintiff herein to the Circuit Court of Appeals of the United States for the Ninth District, copies of the following:

- (1) Plaintiff's original complaint.
- (1½) Original subpoena with proof of service, on Oregon Real Estate Company.
- (2) Motions of the City of Portland, its Commissioners and Auditor to dismiss said complaint.
- (3) Motions by School District No. 1, Multnomah County, Oregon, and its directors to dismiss said complaint.
- (4) Order made on said motion.
- (5) Plaintiff's amendment to his bill of complaint with proof of service.
- (6) Plaintiff's supplementary bill of complaint with proof of service. [97]
- (7) Motions by defendant City of Portland, its Commissioners and Auditor, to dismiss the cause.
- (8) Motions by School District No. 1, Multnomah County, and its directors to dismiss said cause.
- (9) Proof of service of amendment to the complaint and also supplemental complaint upon defendant Oregon Real Estate Company.

- (10) Order of the Court on hearing said motions.
- (11) Copy of judgment of dismissal, or
- (12) Decree of the court.
- (13) Petition for appeal and order allowing appeal, with proof of service.
- (14) Assignments of error, with proof of service.
- (15) Bond and approval thereof, with proof of service.
- (16) Citation, with proof of service.
- (17) This praecipe.
- (18) Certificate of clerk.

ISHAM N. SMITH,
Attorney for Plaintiff.

Service accepted December 18, 1922.

H. M. TOMLINSON,
Of Attorneys for the City of Portland, Its Mayor,
Commissioners and Officers.

STANLEY MYERS,
District Attorney for Multnomah County,
Attorney for School District No. 1, Multnomah
County, Oregon, Its Board of Directors, etc.

Filed December 15, 1922. G. H. Marsh, Clerk.
[98]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of
the United States for the District of Oregon, do

hereby certify that the foregoing pages numbered from 5 to 98, inclusive, constitute the transcript of record on appeal from the final decree in the said court in the case of J. B. C. Lockwood, Plaintiff and Appellant, vs. The City of Portland, a Municipal Corporation, George L. Baker, Mayor thereof, A. L. Barbur, Commissioner, John M. Mann, Commissioner, C. A. Bigelow, Commissioner, S. C. Pier, Commissioner, of said City of Portland, George R. Funk, Auditor of said City of Portland; also School District No. 1, Multnomah County, Oregon, Including the City of Portland, a Body Politic and Corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas, and F. C. Pickering, Directors of said School District No. 1; also Oregon Real Estate Company, a Corporation, Defendants and Appellees; that I have prepared the foregoing transcript in accordance with the praecipe for transcript filed by the said appellant and that the same is a full, true, and correct transcript of the record and proceedings had in said court in said cause which the said praecipe directed to be included therein as the same appear of record and on file at my office and in my custody.

I further certify that I return to the United States Circuit Court of Appeals for the Ninth Circuit the original citation in said cause with the said transcript of record annexed thereto.

I further certify that the cost of the foregoing transcript is \$23.05, and that the same has been paid by the appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the said court to be affixed at Portland, in said District, this 22d day of December, 1922.

[Seal]

G. H. MARSH,
Clerk United States District Court, for the District
of Oregon.

[Endorsed]: No. 3962. United States Circuit Court of Appeals for the Ninth Circuit. J. B. C. Lockwood, Appellant, vs. The City of Portland, a Municipal Corporation, George L. Baker, Mayor Thereof, and A. L. Barbur, John M. Mann, C. A. Bigelow and S. C. Pier, Commissioners, and George R. Funk, Auditor Thereof, also School District No. 1, Multnomah County, Oregon, Including the City of Portland, a Body Politic and Corporate, W. L. Woodward, George P. Eisman, Frank L. Shull, W. J. H. Clark, J. E. Martin, George B. Thomas and F. C. Pickering, Directors of Said School District No. 1, and Oregon Real Estate Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed December 26, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

